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No. 09-_____

In the Supreme Court of the United States

JOHN PRELESNIK, WARDEN
Petitioner,

v.

CHAMAR AVERY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the decision of the United States Court of Appeals for the Sixth Circuit, which affirmed the grant of a habeas petition, abrogated the "prejudice" prong of *Strickland v. Washington* by holding that the issue of an alibi witness's credibility is "not" for a reviewing court, but rather is a question for the jury and, therefore, the State trial court's determination that the alibi witnesses lacked credibility was not relevant.

PARTIES TO THE PROCEEDING

Petitioner is Warden John Prelesnik of the Michigan Department of Corrections.

Respondent is Chamar Avery, a State prisoner convicted by a jury of second-degree murder.

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED 1
INTRODUCTION 2
STATEMENT OF THE CASE 4
REASONS FOR GRANTING THE PETITION 6
ARGUMENT 7
I. The new rule created by the Sixth Circuit is inconsistent with *Strickland*. 7
II. The Sixth Circuit's decision conflicts with other federal circuit's application of *Strickland*. 13
III. The new rule created by the Sixth Circuit is not derived from clearly established United States Supreme Court precedent as required by 28 U.S.C. § 2254(d). 17
CONCLUSION 23

TABLE OF AUTHORITIES

Page

Cases

Bell v. Cone,
535 U.S. 685 (2002) 17, 18

Bottoson v. Moore,
234 F.3d 526 (11th Cir. 2000) 15, 16

Brecht v. Abrahamson,
507 U.S. 619 (1993) 13

Freeman v. Graves,
317 F.3d 898 (8th Cir. 2003) 14, 15

Knowles v. Mirzayance,
556 U.S. __; 129 S. Ct. 1411 (2009) .....passim

Newman v. Metrish,
543 F.3d 793 (6th Cir. 2008) 22

Smith v. Berghuis,
543 F.3d 326 (6th Cir. 2008) 22

Strickland v. Washington,
466 U.S. 668 (1984) .....passim

Thompkins v. Berghuis,
547 F.3d 572 (6th Cir. 2008) 22

United States v Cronic,
466 U.S. 648 (1984) .....passim

United States v. Olson,
846 F.2d 1103 (4th Cir. 1988) 14

Woodford v. Visciotti,
537 U.S. 19 (2002) 18

Wright v. Van Patten,
__ U.S. __; 128 S. Ct. 743 (2008) 18, 20, 22

Statutes

28 U.S.C. § 1254(1) 1
28 U.S.C. § 2254 1
28 U.S.C. § 2254(d) 17
28 U.S.C. § 2254(d)(1) 17, 22
28 U.S.C. § 2254(e)(1) 16

Other Authorities

Antiterrorism and Effective Death Penalty Act 3, 7, 17, 22

OPINIONS BELOW

The opinion of the Sixth Circuit is reported at 548 F.3d 434 (6th. Cir 2008). Pet. App. 1a-11a. The opinion of the district court is reported at 524 F. Supp. 2d 908 (W.D. Mich., 2007). Pet. App. 12a-27a. The order of the Michigan Supreme Court denying an application for leave to appeal is reported at 468 Mich. 891; 661 N.W.2d 238 (2003). Pet. App. 28a. The opinion of the Michigan Court of Appeals is unreported. Pet. App. 29a-34a.

JURISDICTION

The Sixth Circuit entered judgment on November 25, 2008, and denied rehearing en banc on February 9, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Section 2254 of Title 28 of the United States Code provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be grated with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

The issue in this case is whether a State trial court can make a finding of fact as to the credibility of a purported alibi witness when evaluating whether a defendant was prejudiced by the unreasonable failure to pursue an alibi defense.

The seminal case evaluating ineffective assistance of counsel is *Strickland v. Washington,* in which this Court held that a habeas petitioner is not entitled to relief unless he can establish both that trial counsel's performance was unreasonably deficient and that but for that deficiency, there is a "reasonable probability" the outcome of the State trial would have been different.[1] This Court has recently held in a case involving the failure to pursue an insanity defense that the question of whether the defense would have been successful is a relevant and important part of the prejudice analysis.[2]

Moreover, two circuits – the Fourth and Eighth – have specifically held that a trial court's determination of the credibility of a purported alibi witness is part of the prejudice analysis. Nevertheless, in contrast to the other circuits, the Sixth Circuit held that the question of an alibi witness's credibility was "not" for the trial court to determine. Instead, it held that such evidence must

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[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

[2] *Knowles v. Mirzayance*, 556 U.S. __; 129 S. Ct. 1411 (2009).

be evaluated by a jury in order to give a defendant a "reasonable shot of acquittal." Thus, if the Sixth Circuit decision is allowed to stand, the question whether a trial court can consider if a purported alibi defense is credible – and, therefore, whether the failure to present such a defense would create a "reasonable probability" of a different outcome – depends on where one resides.

The fact that the Sixth Circuit reached this decision in habeas corpus is notable, because the standard under AEDPA requires that the State court's decision on the merits be an unreasonable application of clearly established Supreme Court precedent. There is no Supreme Court precedent that has established that a State trial court cannot consider the credibility of an alibi witness in determining whether trial counsel was ineffective for calling them. Moreover, this Court has never articulated a "reasonable shot of acquittal" standard for evaluating claims under *Strickland*. It is not the role of habeas for the federal courts to adopt new standards such as the one adopted here.

The State of Michigan notes that it is filing three other petitions for certiorari contemporaneously with this petition. See *Berghuis v. Thompkins*, (09-___); *Metrish v. Newman*, (09-___); and *Berghuis v. Smith*, (09-___). All four are murder cases, all published, all reaching disposition in February 2009, in which the State of Michigan contends the Sixth Circuit failed to accord the State court decisions with the proper level of deference required by AEDPA. These cases evidence a pattern by the Sixth Circuit of usurping the role of the State courts by failing to properly apply AEPDA. This failure has dramatic consequences for this case, by wrongly vacating Avery's murder conviction. This Court should grant this petition.

STATEMENT OF THE CASE

Chamar Avery was charged with and convicted by a jury of second-degree murder for shooting pizza-delivery driver Jeffrey Stanka. The conviction was largely based on the eyewitness testimony of Avery's childhood friend, Jacklyn Baker. Baker testified that on the night of Stanka's murder, she heard a sound like a gunshot, looked out of her window, and observed Avery and another male emerge from Stanka's pizza delivery vehicle. Pet. App. 2a-3a.

On direct appeal, the Michigan Court of Appeals granted Avery's motion to remand for an evidentiary hearing on the issue of whether trial counsel was ineffective for failing to produce an alibi defense at trial. Avery identified three witnesses that he believed trial counsel should have called in his defense; LaVelle Crimes, Damar Crimes, and Darius Boyd. These witnesses – including purported alibi witnesses Damar Crimes and Boyd – testified at an extensive evidentiary hearing. The State trial court held that LaVelle's testimony was not just unhelpful, but was arguably inculpatory. Pet. App. 44a. Moreover, the court concluded that the purported alibi witnesses lacked credibility. Pet. App. 46a.

Witness LaVelle Crimes could not account for Avery's whereabouts at the time of the murder. Moreover, his testimony established that Avery owed him money for car repairs and that the car repair bill was paid in cash after the time the crime occurred. Pet. App. 37a. The trial court opined that trial counsel "would have been a fool" to call LaVelle Crimes as a witness because LaVelle supported a motive for the murder, i.e., the fact that Avery owed LaVelle money.

The testimony of purported alibi witness Damar Crimes was inconsistent with Avery's testimony on a fundamental point. Pet. App. 41a. Damar testified that Avery dropped off his automobile at the repair shop on the day of the murder, while Avery claimed to have dropped the automobile off on the day before the murder. Pet. App. 40a - 41a. The trial court noted also that, according to Damar's testimony, he only tried one time to get in contact with Avery's lawyer. Pet. App. 40a. It is extraordinarily unlikely, to say the least, that Damar – a self-described close friend of Avery's – would only make one attempt to give exculpatory evidence to save his friend from a murder charge.

Finally, the trial court concluded that witness Darius Boyd – who was allegedly with Avery and Damar Crimes – was completely incredible. Specifically, the court noted that his testimony "suggests to me [] a manufacturing of testimony." Pet. App. 46 a. As a result, the State trial court concluded that counsel was not ineffective for failing to pursue the alibi defense and in not calling these witnesses. Pet. App. 48a

Avery filed a federal habeas petition, which the district court granted. Pet. App. 27a. The United States Court of Appeals for the Sixth Circuit affirmed, and then denied rehearing. Pet. App. 11a. Specifically, the Sixth Circuit concluded that the issue of the purported alibi witnesses's credibility was "not" a question for the reviewing court, but rather "is a task for the jury." Pet. App. 9a. Therefore, the Sixth Circuit gave no consideration to the State court's determinations that the purported alibi witnesses lacked credibility and that the testimony appeared to be manufactured. Pet. App. 9a. In essence the Sixth Circuit applied a *Cronic* standard in cases where trial counsel failed to procure alibi witnesses, "reasoning" that that the existence of

two uncalled "alibi" witness – no matter how inherently incredible – establishes prejudice because it deprived Avery of a "reasonable shot of acquittal."

REASONS FOR GRANTING THE PETITION

In *Strickland v. Washington*, this Court held that a habeas court may not grant relief based on a claim of ineffective assistance of counsel unless the State prisoner can establish *both* that trial counsel's performance was deficient and that the deficient performance prejudiced the defense.[3] This Court has defined "prejudice" as an error so serious that it calls into question the reliability of the entire trial.[4] *Strickland* makes it clear that "unless [a petitioner] makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable."[5]

But the Sixth Circuit's decision below abrogates the "prejudice" prong of *Strickland* because it forbids a State trial court from considering whether a proposed alibi witness is sufficiently credible to create a "reasonable probability" that the outcome of the trial would have been different. According to the Sixth Circuit, it does not matter how outlandish a purported alibi defense may be because it is always up to the jury to determine whether that defense is credible. Thus, under the new rule invented by the Sixth Circuit, the failure to pursue *any* alibi defense is *per se* unreasonable because it deprives the defendant of a "reasonable shot of acquittal." The result is that the Sixth Circuit has

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[3] *Strickland*, 466 U.S. at 687.

[4] *Strickland*, 466 U.S. at 687.

[5] *Strickland*, 466 U.S. at 687.

effectively abrogated *Strickland* in regard to alibi witnesses and has replaced it with a *Cronic* analysis.

Moreover, the Sixth Circuit's decision conflicts with decisions of the United States Courts of Appeals for the Fourth and Eighth Circuits holding that a proposed alibi whiteness's credibility should be considered in determining whether trial counsel was ineffective for failing to call that witness and whether the defendant was prejudiced by that failure. Also, the United States Court of Appeals for the Eleventh Circuit has held that a State court's determination of a witnesses's credibility plays an essential role in the prejudice analysis. The Sixth Circuit's newly minted rule conflicts with these other circuit courts and this Court should resolve that split.

Furthermore, the rule invented by the Sixth Circuit is not one that is "clearly established" by this Court. Therefore, the Sixth Circuit's erred in determining that the Michigan courts "unreasonably" applied *Strickland* under the AEDPA.

ARGUMENT

I. The new rule created by the Sixth Circuit is inconsistent with *Strickland*.

In *Strickland v. Washington*, this Court set forth the standard to be applied to claims of ineffective assistance of counsel. A convicted defendant claiming constitutionally ineffective assistance must establish both deficient "performance" and "prejudice" to the defense. In assessing the "performance" component, this Court held that a habeas petitioner "must show that counsel's representation fell below an objective standard

of reasonableness."[6] Turning to the "prejudice" component, "it is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding."[7] "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[8]

In this case, the State trial court held that trial counsel was not ineffective for failing to call the alibi witnesses because their testimony was either not helpful to defendant's case or it was incredible. The trial judge who held the evidentiary hearing in State court evaluated the live, in-person testimony of the three "alibi" witnesses called by Avery and found them to be completely incredible. And on that basis, the trial judge rejected defendant's claim of ineffective assistance adding, "I can't say that this would have resulted in a different result at all . . . ." It follows, then, that Avery could not have suffered prejudice from trial counsel's failure to call the "alibi" witnesses, because no reasonable juror could believe their manufactured story. In other words, the failure to call wholly non credible witnesses cannot deprive a defendant of a fair trial because their false testimony could not conceivably have changed the outcome. Yet that is what the Sixth Circuit's decision not only permits, but mandates.

According to the Sixth Circuit, the credibility of proposed witnesses should "not" be determined by a

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[6] *Strickland*, 466 U.S. at 698.

[7] *Strickland*, 466 U.S. at 698.

[8] *Strickland*, 466 U.S. at 698.

reviewing court. Rather, the Sixth Circuit stated that evaluating the credibility of the witnesses "is a task for the jury." In so doing, it created a new rule such that prejudice is established when trial counsel fails to call an alibi witness *no matter how lacking in credibility that witness may be* because the failure to present an alibi witness deprives a defendant of a "reasonable shot of acquittal."

The Sixth Circuit did not explain how a trial court is to assess the impact of a witness on a reasonable jury without evaluating the credibility of that witness. And that is because such an evaluation is not possible under the new rule set forth by the Sixth Circuit. Instead, under this new rule, prejudice is *presumed* in circumstances where trial counsel failed to call a witness whose credibility must be determined by a jury. The only relevant question under the Sixth Circuit's new test is whether trial counsel's actions have deprived the petitioner of a "reasonable shot of acquittal." Pet. App. 10a.

In short, the Sixth Circuit has effectively abrogated the prejudice prong of *Strickland* and has mandated relief for any habeas petitioner who makes any minimal showing that there was evidence, whether credible or not, that counsel could have pursued and presented at trial. Thus, a habeas petitioner in the Sixth Circuit need not show a reasonable probability that an alibi defense – or presumably any other defense that relies on a jury's determination of credibility – would have altered the outcome of the State trial. This rule runs afoul of this Court's statement in *Strickland* that the prejudice prong "discourages insubstantial claims by requiring more than a showing of prejudice, which could

virtually always be made, of some conceivable adverse effect on the defense."[9]

Under *Strickland*, to the contrary, the question is not whether a habeas petitioner was denied a "reasonable shot of acquittal," but rather whether there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

The Sixth Circuit has done exactly what this Court sought to discourage in *Strickland*. It affords defendants habeas relief based on counsel's error even if that error involves evidence of an insubstantial nature. Moreover, it usurps the trial court's role in making an assessment of the quality of that evidence. Rather, it holds that the failure to present any alibi defense, no matter how bizarre or unbelievable, is *presumed* prejudicial.[10] Thus, the Sixth Circuit has imposed the standard from *Cronic* in cases where trial counsel unreasonable fails to call an alibi witness.[11] This is in direct conflict with *Strickland*.

This new rule by the Sixth Circuit also contradicts this Court's application of *Strickland* in other circumstances where the credibility of the challenged evidence is ordinarily a matter of fact for the jury. For instance, this Court recently addressed the applicability

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[9] *Strickland v. Washington*, 466 U.S. at 690.

[10] This new rule dilutes the first prong of *Strickland* as well. A trial counsel who decides not to call purported alibi witnesses identified by his client because, in his reasonable professional judgment, they lacked credibility is arguably ineffective under the court of appeals's new rule because such a credibility determination is "always" a matter to be decided by the jury.

[11] *United States v Cronic*, 466 U.S. 648, 659 (1984).

of the "prejudice" prong to the failure to pursue an insanity defense in *Knowles v. Mirzayance*.[12]

In *Mirzayance*, the defendant was charged with murder and claimed during the guilt phase of his trial that due to temporary insanity he was incapable of the premeditation or deliberation necessary to prove first-degree murder. The jury rejected the claim and convicted the defendant of first-degree murder. As a result of this rejection, trial counsel recommended to defendant that he abandon his plea of not guilty by reason of insanity before the insanity phase of the trial. The court of appeals affirmed the district court's grant of habeas relief, on the basis that there was "nothing to lose" by pursing the insanity defense and that there was a "reasonable probability" that the jury would have found defendant insane. This Court reversed the grant of habeas relief, holding that the court of appeals's "nothing to lose" standard has no basis in established United States Supreme Court precedent.

Additionally, this Court noted that the defendant failed to establish prejudice because it was "highly improbable" that a jury which rejected the defendant's temporary insanity claim during the guilt phase of his trial would accept his insanity claim during the insanity phase:

> Mirzayance has not demonstrated that he suffered prejudice from his counsel's performance. See *Strickland*, 466 U.S., at 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding

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[12] *Mirzayance*, 129 S.Ct. at 1422.

> if the error had no effect on the judgment"). To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., at 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674. To prevail on his ineffective-assistance claim, Mirzayance must show, therefore, that there is a "reasonable probability" that he would have prevailed on his insanity defense had he pursued it. This Mirzayance cannot do. It was highly improbable that a jury, which had just rejected testimony about Mirzayance's mental condition when the State bore the burden of proof, would have reached a different result when Mirzayance presented similar evidence at the NGI phase. See *supra*, at 12-13. [13]

In order to obtain habeas relief, a petitioner must demonstrate both that trial counsel's performance was deficient and that petitioner was prejudiced by that deficient performance. This Court has held that a petitioner suffers prejudice when "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." [14] But under the Sixth Circuit's new "reasonable shot of acquittal" standard, a State trial court cannot make a factual finding whether a proposed alibi witness is

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[13] *Mirzayance*, 129 S.Ct. at 1422.

[14] *Strickland*, 466 U.S. at 698.

credible, i.e., whether their testimony would have created a reasonable possibility of a different result. This new rule is fundamentally inconsistent with *Strickland* and should not be allowed to stand. This Court should grant certiorari, reverse the Sixth Circuit, and reiterate the proper two-prong approach to ineffective assistance of counsel claims set forth under *Strickland*.

II. The Sixth Circuit's decision conflicts with other federal circuit's application of *Strickland*.

The prejudice prong of *Strickland* comports with the principle that a habeas petitioner is only entitled to relief if he is being incarcerated because of a constitutional error.[15] But the Sixth Circuit has concluded that the unreasonable failure to call an alibi witness is *per se* prejudicial, because it deprives the defendant of a "reasonable shot of acquittal." The Sixth Circuit's new rule is at odds with the holdings of the United States Courts of Appeals for the Fourth, Eighth, and Eleventh Circuits. The Fourth and Eighth Circuits have held directly that a habeas petitioner must establish that he actually suffered prejudice from his counsel's failure to pursue an alibi defense. Similarly, in the context of the failure to present an expert witness, the Eleventh Circuit has noted that the determination of a proposed witness's credibility is an important part of the prejudice analysis under *Strickland*.

The Fourth Circuit has held that the credibility of the purported alibi witnesses may be considered in determining whether there is a reasonable probability that their testimony would have altered the result of the

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[15] See *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

trial.[16] In *United States v. Olson*, the defendant claimed that his trial counsel was ineffective for failing to call an alibi witness. The purported witness testified at an evidentiary hearing following the defendant's conviction. The district court judge determined that the witness's testimony was "incredible, inconsistent, and unlikely to persuade the jury."[17] The Fourth Circuit – giving proper deference to the trial judge who had the opportunity to observe the live testimony – agreed with the district court's conclusion and held that "defendant and his appellate counsel have failed to establish that had counsel presented an alibi defense, there is a 'reasonable probability that . . . the result of the proceeding would have been different.'"[18]

Likewise, the Eighth Circuit has held that "in cases involving alleged ineffective assistance of counsel for failure to investigate an alibi defense, we have consistently required a defendant to prove actual prejudice under *Strickland*."[19] In *Freeman v. Graves*, the defendant filed a petition for a writ of habeas corpus on the basis that his State trial counsel was ineffective for failing to investigate and call alibi witnesses. The district court granted habeas relief, holding that trial counsel unreasonably failed to investigate the alibi witnesses and that prejudice should be presumed under the *Cronic* standard, just as the Sixth Circuit has here.[20] The Eighth Circuit reversed, holding that *Strickland*, not *Cronic*, governed the petitioner's ineffective assistance

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[16] *United States v. Olson*, 846 F.2d 1103, 1109 (4th Cir. 1988).

[17] *Olson*, 846 F.2d at 1109.

[18] *Olson*, 846 F.2d at 1109 (quoting *Strickland*, 466 U.S. at 694).

[19] *Freeman v. Graves*, 317 F.3d 898, 901 (8th Cir. 2003).

[20] *United States v. Cronic*, 466 U.S. 648, 659 (1984).

claim and, therefore, he was required by established United States Supreme Court precedent to establish that he suffered prejudice as a result of trial counsel's failure to investigate the alibi witnesses.[21] Because the petitioner did not establish what the purported alibi witnesses would have testified to, the Eighth Circuit held that he failed to demonstrate that he suffered prejudice from any error. Moreover, the court noted that "the testimony of alibi witnesses, especially friends and relatives of the defendant, does not assure an acquittal and is sometimes counterproductive."[22] This is in direct conflict with the decision of the Sixth Circuit here.

The Eleventh Circuit has recognized that the prejudice prong applies to the unreasonable failure to call an expert witness. In *Bottoson v. Moore*, the petitioner claimed that his trial counsel was ineffective for failing to present mental health evidence at the penalty phase of his trial following his conviction for murder.[23] The State courts had held on direct review that petitioner was not prejudiced by the failure to present expert testimony at the penalty phase of the trial because the evidence of his mental health problems would not outweigh or overcome the aggravating circumstances of the murder. Moreover, the State court noted that the testimony of petitioner's expert witness was contradicted by the State's expert and that the trial court had found the State's expert to be more credible.

The Eleventh Circuit held that the State courts were entitled to make such a credibility determination and that their determination was entitled to deference

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[21] *Freeman*, 317 F.3d at 900.

[22] *Freeman*, 317 F.3d at 900.

[23] *Bottoson v. Moore*, 234 F.3d 526 (11th Cir. 2000).

under 28 U.S.C. § 2254(e)(1).[24] Specifically, "[w]hen there is conflicting testimony by expert witnesses, as here, discounting the testimony of one expert constitutes a credibility determination, a finding of fact. A finding of fact made by a state court is presumed to be correct, and a habeas petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1)."[25] Thus, the determination of the credibility of an expert witness is not just permitted, but plays an essential role in the prejudice analysis. The Eleventh Circuit also made clear that the State court's determination of credibility is entitled to deference, and that the petitioner has the burden to demonstrate that such a determination was unreasonable.

But the Sixth Circuit's new rule does not allow State trial courts to determine whether evidence offered by a habeas petitioner would have actually made a difference at his trial. Even if a trial error would not have made a difference – and on that basis a petitioner cannot be said to be incarcerated because of a constitutional error – the Sixth Circuit's rule would nevertheless grant that petitioner habeas relief because he was entitled to a "reasonable shot of acquittal." This standard is wholly at odds with the application of *Strickland* by the Fourth, Eighth, and Eleventh Circuits. According to the Fourth and Eighth Circuits, even if trial counsel unreasonably failed to call an alibi witness, the habeas petitioner nevertheless must show that the alibi witnesses's testimony creates a reasonable possibility of a different outcome. Moreover, the Eleventh Circuit notes that in the context of an unreasonable failure to

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[24] *Moore*, 234 F.3d at 534.

[25] *Moore*, 234 F.3d at 534.

call an expert witness, the State trial court's determination of credibility plays an essential role in the prejudice analysis. This Court should grant certiorari to resolve this split among the circuits.

III. The new rule created by the Sixth Circuit is not derived from clearly established United States Supreme Court precedent as required by 28 U.S.C. § 2254(d).

Under AEDPA, federal courts have limited authority to grant habeas relief to a State prisoner. Where a State court has adjudicated the petitioner's claim on the merits, a federal court can only grant a writ of habeas corpus where the State's adjudication "resulted in a decision that was "contrary to", or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States."[26] This Court has explained that "[a] federal habeas court may issue the writ under the 'contrary to' clause if the state court applies a rule differently from the governing law set forth in [Supreme Court] cases, or if it decides a case differently than [the Supreme Court has] done on a set of materially indistinguishable facts."[27] Here, the Sixth Circuit's conclusion that the question of whether a purported alibi witness is credible is "not" a question for the State court is not based on any decision of this Court. Moreover, there is no Supreme Court precedent – established or otherwise – supporting the Sixth Circuit's creation of a "reasonable shot of acquittal" standard. As such, the plain language of AEDPA bars habeas relief under these circumstances.

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[26] 28 U.S.C. § 2254(d)(1).

[27] *Bell v. Cone*, 535 U.S. 685, 694 (2002).

As to the "unreasonable application" clause, this Court has explained that a federal habeas court may only grant relief when "the state court correctly identifies the governing legal principal from [Supreme Court] decisions but unreasonably applies it to the facts of the particular case."[28] But it is not enough for the federal court to determine that the state court got it wrong.[29] Rather, "the state court's application of clearly established federal law [must have been] objectively unreasonable."[30]

This Court has made clear on several occasions that it takes a narrow view of what constitutes clearly established law. For example, in *Wright v. Van Patten*, this Court held that "clearly established" means that the precedent cited by the habeas court must have been clearly stated by this Court.[31] In *Van Patten*, the petitioner pleaded guilty to reckless homicide. His attorney was not physically present at the plea hearing, but, rather, participated by speakerphone. The State court rejected petitioner's subsequent claim that counsel's physical absence violated the Sixth Amendment.

On habeas review, the United States Court of Appeals for the Seventh Circuit concluded that the claim should have been resolved, not under *Strickland*, but under *Cronic*. This Court ultimately reversed, explaining that its precedents had not "clearly held" that *Cronic* should apply under those circumstances:

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[28] *Bell*, 535 U.S. at 694.

[29] *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002).

[30] *Bell*, 535 U.S. at 694.

[31] *Wright v. Van Patten*, __ U.S. __; 128 S. Ct. 743, 746 (2008).

No decision of this Court, however, squarely addresses the issue in this case, see [*Van Patten v. Deppisch*, 434 F.3d 1038, 1040 (7th Cir. 2006)] (noting that this case "presents [a] novel . . . question"), or clearly establishes that *Cronic* should replace *Strickland* in this novel factual context. Our precedents do not clearly hold that counsel's participation by speaker phone should be treated as a "complete denial of counsel," on par with total absence. Even if we agree with Van Patten that a lawyer physically present will tend to perform better than one on the phone, it does not necessarily follow that mere telephone contact amounted to total absence or "prevented [counsel] from assisting the accused," so as to entail application of *Cronic*. The question is not whether counsel in those circumstances will perform less well than he otherwise would, but whether the circumstances are likely to result in such poor performance that an inquiry into its effects would not be worth the time. Cf. *United States v. Gonzalez-Lopez*, 548 U.S. 140,___ , 126 S. Ct. 2557, 2563, 165 L. Ed. 2d 409, 418 (2006)) (Sixth Amendment ensures "*effective* (not mistake-free) representation" (emphasis in original)). Our cases provide no categorical answer to this question, and for that matter the several proceedings in this case hardly point toward one. The Wisconsin Court of Appeals held counsel's performance by speaker phone to be constitutionally effective; neither the Magistrate Judge, the District Court, nor

> the Seventh Circuit disputed this conclusion; and the Seventh Circuit itself stated that "[u]nder *Strickland*, it seems clear Van Patten would have no viable claim." *Deppisch*, 434 F.3d at 1042.
>
> Because our cases give no clear answer to the question presented, let alone one in Van Patten's favor, "it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.'" [*Carey v. Musladin*, 549 U.S. 70; 127 S. Ct. 649, 651; (2006)] (quoting 28 U.S.C. § 2254(d)(1)). Under the explicit terms of § 2254(d)(1), therefore, relief is unauthorized.[32]

Likewise, in *Mirzayance*, this Court rejected the creation of a "nothing to lose" standard for the unreasonable failure to pursue an insanity defense.[33] In *Mirzayance*, the defendant had claimed during the guilt phase of his State trial that he was temporarily insane at the time he killed the victim and, therefore, was incapable of the premeditation or deliberation necessary to prove first-degree murder. The jury rejected the claim and convicted the defendant of first-degree murder. After the jury's verdict, trial counsel advised defendant not to pursue his not guilty by reason of insanity (NGI) defense during that phase of the trial and defendant accepted the advice. The defendant filed a petition for a writ of habeas corpus, claiming that trial counsel was ineffective for failing to pursue the insanity defense during the NGI phase of the trial. The court of appeals affirmed the district court's grant of habeas relief,

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[32] *Van Patten*, 128 S. Ct. at 746.

[33] *Mirzayance*, 129 S. Ct. at 1419.

holding that counsel was ineffective because there was "nothing to lose" by pursing the NGI claim. This Court rejected the "nothing to lose" standard, noting that it had no basis in established Supreme Court precedent:

> But this Court has held on numerous occasions that it is not "'an unreasonable application of clearly established Federal law'" for a state court to decline to apply a specific legal rule that has not been squarely established by this Court. This Court has never established anything akin to the Court of Appeals' "nothing to lose" standard for evaluating *Strickland* claims. Indeed, Mirzayance himself acknowledges that a "nothing to lose" rule is "unrecognized by this Court." And the Court of Appeals did not cite any Supreme Court decision establishing a "nothing to lose" standard in any of its three opinions in this case.[34]

With these decisions this Court has explicitly stated that "clearly established" means *clearly* established. Here, the Sixth Circuit has failed to demonstrate *any* Supreme Court precedent that stands for the proposition that a State trial court cannot consider the credibility of an alibi witness in determining whether trial counsel was ineffective for calling them. But this Court has *never* articulated a "reasonable shot of acquittal" standard for evaluating claims under *Strickland*. The Sixth Circuit did not city any Supreme Court decision establishing a "reasonable shot of acquittal" standard. This is because no such decision exists. Inasmuch as this Court has never articulated the

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[34] *Mirzayance*, 129 S. Ct. at 1419.

rule invented by the Sixth Circuit in this case, "it cannot be said that the State court 'unreasonabl[y] appli[ed] clearly established Federal law.'"[35] The action here by the Sixth Circuit also is not an isolated failure to accord a State court decision the proper deference under AEDPA. Indeed the Sixth Circuit has exhibited a clearly identifiable pattern in its failure to follow AEDPA. In this regard the State would note that it is contemporaneously seeking certiorari in three other murder cases, all published, in which it contends that the Sixth Circuit, in granting habeas relief, failed to properly apply the AEDPA standard.[36] Therefore, under the plain language of § 2254(d)(1), Avery cannot obtain habeas relief.

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[35] *Van Patten,* 128 S. Ct. 743.

[36] See *Thompkins v. Berghuis,* 547 F.3d 572 (6th Cir. 2008)(the Sixth Circuit determined that there was a violation of *Miranda* where the police continued to interview the defendant where the defendant acknowledged his rights but did not expressly waive them); *Newman v. Metrish,* 543 F.3d 793 (6th Cir. 2008)(the Sixth Circuit determined that there was insufficient evidence even though there was compelling circumstantial evidence of defendant's guilt including evidence linking him to the murder weapons); and *Smith v. Berghuis,* 543 F.3d 326 (6th Cir. 2008)(the Sixth Circuit adopted a new rule – the comparative disparity test – for evaluating whether there was a fair cross section of the community under the Sixth Amendment).

CONCLUSION

The Sixth Circuit's opinion is incompatible with the principles this Court set forth in *Strickland v. Washington*. The Sixth Circuit's creation of a new rule presuming prejudice in cases involving the failure to call alibi witnesses conflicts with the well-reasoned decisions of the Fourth, Eighth, and Eleventh Circuits. Moreover, the new rule created by the Sixth Circuit has no basis in Supreme Court precedent – clearly established or otherwise.

The petition for a writ of certiorari should be granted.

Respectfully submitted

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Dated: May, 2009

TABLE OF CONTENTS

Page

United States Sixth Circuit Court of Appeals
Opinion dated November 25, 2008..... 1a-11a

United States District Court Opinion
dated November 8, 2007..... 12a-27a

Michigan Supreme Order
dated April 29, 2003 .....28a

Michigan Court of Appeals
Opinion dated October 8, 2002..... 29a-34a

Motion Transcript dated
November 2, 2001 ..... 35a-48a

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CHAMAR AVERY,

Petitioner-Appellee,

v. No. 07-2522

JOHN PRELESNIK,

Respondent-Appellant

Appeal from the United States District Court for the Western District of Michigan at Grand Rapids.
No. 04-00289—Richard A. Enslen, District Judge.

Argued: October 29, 2008

Decided and Filed: November 25, 2008

Before: MARTIN and OILMAN, Circuit Judges; DOWD, District Judge.*

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*The Honorable David D. Dowd, Jr., Senior United States District Judge for the Northern District of Ohio, sitting by designation.

COUNSEL

ARGUED: Janet A. YanCleve, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellant. Chari Grove, STATE APPELLATE DEFENDER OFFICE, Detroit, Michigan, for Appellee. **ON BRIEF:** Debra M. Gagliardi, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellant. Chari Grove, STATE APPELLATE DEFENDER OFFICE, Detroit, Michigan, for Appellee.

OPINION

BOYCE F. MARTIN, JR., Circuit Judge. Petitioner Chamar Avery was convicted in Michigan state court of second degree murder. After exhausting his state appeals, Avery petitioned for a writ of habeas corpus in federal district court. The district court granted his petition, holding that Avery was deprived of his right to effective assistance of counsel when his attorney failed to investigate and interview potential alibi witnesses and that the Michigan Court of Appeals's conclusion to the contrary was objectivelyunreasonable. We agree and AFFIRM the district court's well-reasoned judgment.

I.

The facts appear in detail in the district court opinion, *Avery v. Prelesnik*, 524 F. Supp. 2d 903 (W.D. Mich. 2007), and we summarize them here. On January 15, 2000, between 7:30 and 8:00 in the evening, pizza delivery man Geoffrey Stanka was shot arid killed on Dayton Street in Detroit, Michigan. Subsequently, Chamar Avery was charged in state court with first degree felony murder and felony

firearms possession for his alleged role in Stanka's death. David Lankford served as Avery's trial attorney. Before trial, Avery told Lankford that he could not have committed the murder because at that time, he was thirty minutes away from Dayton Street with his friend, Damar Crimes, waiting for his car to be repaired. Yet Lankford did not present an alibi defense at trial. Avery was convicted of second degree murder and was sentenced to twenty to fifty years in prison.

Following his conviction, Avery appealed to the Michigan Court of Appeals, which remanded the case for post-conviction proceedings. The trial court held an evidentiary hearing on the issue of whether Avery's counsel was ineffective for failing to present an alibi defense at trial. At the hearing, Lankford, Avery, Crimes, and Crimes's friend, Darius Boyd, testified. After those witnesses testified, the judge ruled from the bench that Avery was not denied effective assistance of counsel, finding that Lankford made "cogent decisions . . . and the way he conducted himself was more than adequate, was very good." The judge characterized Crimes's and Boyd's testimony that they were with Avery at the time of the murder to be "incredibly inconsistent on some basic times and facts." Though she did not explicitly analyze Crimes's testimony, she found Boyd's to be "totally incredible," suggesting "a manufacturing of testimony."

Avery appealed, and the Michigan Court of Appeals rejected his ineffective assistance of counsel claim, concluding that "counsel made a valid strategical decision not to present [an alibi] defense because the information [Lankford] obtained did not provide defendant with an alibi for the time of the crime." *People v. Avery*, 2002 WL 31264726, *1 (Mich. Ct. App. 2002). The court of appeals did not analyze or even mention the substance or credibility of Crimes's

or Boyd's testimony, but rather, relying on Lankford's testimony about his investigatory efforts, concluded that "counsel adequately investigated." *Id.* The Michigan Supreme Court denied Avery leave to appeal.

Avery filed a petition for a writ of habeas corpus in federal district court. A magistrate judge issued a report recommending the writ be granted, which the district court adopted in November 2007. It found that Lankford's investigatory efforts were deficient, and that Avery suffered prejudice in his trial as a result. *Avery*, 524 F. Supp. 2d at 906-10. The district court denied the State's subsequent motion for stay. The State now appeals.

II.

We review a district court's decision regarding a habeas petitioner's claim of ineffective assistance of counsel de novo. *Higgins v. Renico,* 470 F.3d 624, 630 (6th Cir. 2006). Under the Antiterrorism and Effective Death Penalty Act of 1996, a district court shall not grant a habeas petition with respect to any claim that was adjudicated on the merits in the state courts unless the adjudication resulted in a decision that: (1) was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court; or (2) was based on an unreasonable determination of the facts in light of the evidence presented to the state courts. 28 U.S.C. § 2254(d).

Under the "contrary to" clause, a federal court may grant habeas if the state court arrived at a conclusion opposite to one reached by the Supreme Court on a question of law, or if the state court decided a case differently than the Supreme Court on materially indistinguishable facts. *Boykin v. Webb,* 541 F.3d 638

(6th Cir. 2008) (citing *Williams v. Taylor,* 529 U.S. 362, 412-13(2000)). Under the "unreasonable application" clause, a habeas court may grant the writ if the state court identified the correct legal principle from the Supreme Court's decisions but unreasonably applied it to the petitioner's case. *Id.* Although courts of appeals' decisions do not establish new rules, the court may look to such decisions to inform its analysis of whether a legal principle had been clearly established by the Supreme Court. *Hill v. Hofbauer,* 337 F.3d 706, 716 (6th Cir. 2003). Finally, the habeas petitioner has the burden of rebutting, by clear and convincing evidence, the presumption that the state court's factual findings were correct. 28 U.S.C. § 2254(e)(1); *McAdoo v. Rio,* 365 F.3d 487, 493-94 (6th Cir. 2004).

III.

Claims of ineffective assistance of counsel have two parts: "A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." *Wiggins v. Smith,* 539 U.S. 510, 521 (2003) (citing *Strickland v. Washington,* 466 U.S. 668, 687 (1984)). The Supreme Court assesses performance using an "objective standard of reasonableness" and "prevailing professional norms." *Strickland,* 466 U.S. at 688. Prejudice occurs when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

A. Failure to Investigate as Deficient Performance

Avery argues that his trial counsel's efforts to investigate potential alibi witnesses in preparation for trial were deficient, Strickland instructs:

> [S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

466 U.S. at 690-91. "Under *Strickland* trial counsel has a duty to investigate his case." *Stewart v. Wolfenbarger,* 468 F.3d 338, 356 (6th Cir. 2006). "This duty includes the obligation to investigate all witnesses who may have information concerning his or her client's guilt or innocence." *Id.* (quoting *Towns v. Smith,* 395 F.3d 251, 258 (6th Cir. 2005)). Thus, the question is whether "reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 691.

Here, Lankford made at least some attempt to contact the alibi witnesses whose names Avery had provided him: He sent an investigator to Crimes Auto and Towing, where Avery had told Lankford he could contact potential alibi witnesses; the investigator met with LaVelle Crimes (Damar Crimes's brother), who reported that Avery had left his car for repairs and departed with Damar Crimes to visit someone on Ardmore Street, returning at approximately 9:15 or 9:30 that evening; Lankford believed the investigator had left information on how to contact Lankford; and Lankford testified that he instructed the investigator to attempt to follow-up over the phone and in person.

These efforts satisfied the Michigan Court of Appeals, which concluded that Lankford "adequately investigated" Avery's potential alibi witnesses and that he "made a valid strategical decision not to present such a defense because the information he obtained did not provide defendant with an alibi for the time of the crime." *People v. Avery*, 2002 WL 31264726 at *1.

But we believe that Lankford's investigation was far "less than complete." *See Strickland,* 466 U.S. at 691. He never personally attempted to contact any of the potential alibi witnesses, and, after the investigator learned from LaVelle Crimes that Avery was with Damar Crimes during the time of the murder, the investigator did not ask for Damar's home address or phone number, even though LaVelle Crimes could have provided it. At the evidentiary hearing, Lankford testified that after the report from the investigator, he was "interested . . . sound[ed] like I want to talk to Damar." But at the time, LaVelle Crimes was only seventeen years old, and the investigator (and consequently Lankford) left it up to him to get back in touch with important alibi evidence in a murder trial. We agree with the district court's recognition that "[t]his sequence of events shows just how unreasonable it was for a seasoned attorney like Lankford to leave it up to teenagers to get back in touch with him about important alibi evidence in a murder trial." *Avery*, 524 F. Supp. 2d at 909.

The State, nevertheless, argues that Lankford "had inadequate information on which to base an alibi defense, not through lack of investigation but because of inconsistent accounts of the events on the evening of the murder." But the limitations on Lankford's investigation rendered it impossible for him to have made a "strategic choice" not to have Damar Crimes or Darius Boyd testify because he had no idea what they

would have said. There is no reason based on "professional judgment" why Lankford would not have pursued speaking to Damar Crimes. The district court correctly concluded that "Lankford was under a duty to reasonably investigate, which entails, at the bare minimum, asking for Damar's phone number or address and reasonably attempting to contact him." *Id.* The district court also correctly observed, this does not mean that Lankford was under an obligation to actually track down Damar Crimes, only that he put in a reasonable effort to do so. For these reasons, we affirm the district court's decision that the Michigan Court of Appeals unreasonably applied Strickland in deferring to Lankford's decision to end his less than complete investigation.

B. Prejudice from Failure to Investigate

To satisfy *Strickland's* prejudice prong, Avery must demonstrate that with effective assistance of counsel, the result of his trial would have been different with a "probability sufficient to undermine the confidence in the outcome." 466 U.S. at 694. He must show "a reasonable probability" that absent his trial attorney's errors, "the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695.

Because the Michigan Court of Appeals found Lankford's efforts to be sufficient, it did not analyze whether Avery suffered prejudice. Similarly, the trial court that conducted the post- conviction evidentiary hearing found that Lankford provided effective assistance of counsel. Though the judge presiding over the hearing observed, "I can't say that this would have resulted in a different result at all," we do not find in the record evidence that the trial court seriously engaged in a complete *Strickland* prejudice analysis, which requires a court to "consider the totality of the evidence before the judge or jury." *Id.* Thus, here, as

in *Rompilla v. Beard,* 545 U.S. 374, 390 (2005), "[b]ecause the state courts found the representation adequate, they never reached the issue of prejudice, and so we examine this element of the Strickland claim de novo." *See also Wiggins,* 539 U.S. at 534.

Avery's claim involves alibi witness testimony that the trial jury did not have before it. To evaluate a claim of prejudice, the court must assess how reasonable jurors would react to the additional alibi testimony had it been presented. In this case, the state judge presiding over the post-conviction evidentiary hearing, describing herself as the "the factfinder," found Boyd's testimony to be "totally incredible" and to suggest "manufacturing testimony." We do not denigrate the role of the factfinder in judging credibility when we review a record in hindsight, but evaluation of the credibility of alibi witnesses is "exactly the task to be performed by a rational jury," *see Matthews v. Abramajtys,* 319 F.3d 780, 790 (6th Cir. 2003), not by a reviewing court. *Cf. United States v. Kelly,* 204 F.3d 652, 656 (6th Cir. 2000) (" the credibility of witnesses is a task for the jury not this court."). Here, although the factors the state judge highlighted in her credibility assessment—including Boyd's ability to remember exact times while failing to recall the date or day of the week that Avery visited his home — may have ultimately affected the credibility of his testimony in the eyes of the jury, but they do not dispose of the issue of prejudice. Notably, the evidentiary hearing occurred approximately a year and three months after Avery's trial, and the record before us does not demonstrate that the presiding judge found fault with Crimes's testimony. Ultimately, as the district court properly recognized, "[O]ur Constitution leaves it to the jury, not the judge, to evaluate the credibility of witnesses in deciding a criminal defendant's guilt or innocence." *Avery,* 524 F.

Supp. 2d at 909 (quoting *Ramonez v. Berghuis*, 490 F.3d 482, 490 (6th Cir. 2007)).

Moreover, *Strickland* instructs that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support" *Id.* Thus, the availability of willing alibi witnesses must also be considered in light of the otherwise flimsy evidence supporting Avery's conviction. *See Strickland*, 466 U.S. at 696. As the district court accurately observed, Avery's conviction was based almost entirely on Jacklyn Barker's eyewitness testimony, which was weak because the crime occurred at night when visibility was diminished and Barker was "peeking" at the crime scene from the window at her home across the road. Barker's testimony was also inconsistent; she testified at a preliminary hearing that she saw Avery smiling, but at trial testified that she "couldn't see his face." Nor did Barker identify Avery from a lineup as one of the individuals she witnessed at the murder scene, despite her testimony that she had known him since she "was little."

In sum, we agree with the district court's conclusion that potential alibi witnesses coupled with an otherwise weak case renders the failure to investigate the testimony sufficient to "undermine confidence" in the outcome of the jury verdict. We do not ask whether Avery was ultimately innocent, but, rather, whether he was deprived a reasonable shot of acquittal. Here, the jury was deprived of the right to hear testimony that could have supplied such "reasonable doubt."

CONCLUSION

Because the Michigan Court of Appeals's application of *Strickland* standard was unreasonable, we AFFIRM the district court's grant of Avery's petition for a writ of habeas corpus.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHAMAR AVERY,

Petitioner,

v.

JOHN PRELESNIK,

Respondent.
_____/

Case No. 1:04-CV-289

Hon. Richard Alan Enslen

OPINION

This matter is before the Court on Respondent John Prelesnik's Objections to United States Magistrate Judge Ellen S. Carmody's Report and Recommendation of August 20, 2007, which recommended granting Petitioner Chamar Avery's habeas petition on one claim. Also before the Court are Petitioner's Objections to the Report, which recommended denying Petitioner's habeas petition on another claim. This Court reviews the Objections, the Report, and pertinent portions of the record de novo pursuant to 28 U.S.C. § 636(b)(I)(B). For the reasons set forth below and in the Report, the Court finds all Objections to be without merit.

I. BACKGROUND

On January 15, 2000, between 7:30 p.m. and 8:00 p.m., Geoffrey Stanka was robbed and killed while attempting to deliver pizza. Petitioner and two other individuals were implicated in this crime, one of whom was tried with Petitioner as a co-defendant, although each had a separate jury. Petitioner was charged with first degree felony murder and possession of a firearm during the commission of a

felony. Following a jury trial in 2000, Petitioner was acquitted of those charges but convicted of second degree murder. Petitioner was sentenced to 20 to 50 years in prison.

Petitioner appealed to the Michigan Court of Appeals, who remanded the matter for a *Ginther*[1] hearing on his ineffective assistance of counsel claims. Upon concluding the *Ginther* hearing, the Michigan trial court denied Petitioner's claims. Petitioner then filed a supplemental brief in the Michigan Court of Appeals alleging, *inter alia,* that he was denied effective assistance of counsel by his trial attorney's failure to present an alibi defense or produce alibi witnesses at trial. The Michigan Court of Appeals affirmed Petitioner's conviction. The Michigan Supreme Court thereafter denied Petitioner's motion for leave to appeal.

Petitioner filed the present Petition for Writ of Habeas Corpus on April 26, 2004 on the following claims:

> I. Petitioner was denied his right to the effective assistance of counsel because of his trial attorney's failure to investigate, contact and interview Petitioner's alibi witnesses, and his failure to produce them at trial.
>
> II. Petitioner was denied his Sixth Amendment right to the effective assistance of counsel when trial counsel failed to object to hearsay testimony

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[1] *People v. Ginther*, 212 N.W.2d 922 (Mich. 1973).

before Avery's jury which was only admissible as to Petitioner's co-defendant.

II. LEGAL STANDARDS

Habeas relief, since 1996, has been limited by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2241 *et seq.,* which provisions are applicable to this case.

AEDPA provides in pertinent part that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

As reflected in the statutory language, there are three avenues for habeas relief: (1) for decisions "contrary" to federal law; (2) for an "unreasonable application" of federal law; and (3) for an

"unreasonable determination of the facts." *Id.* Under the caselaw of the United States Supreme Court and the Sixth Circuit Court of Appeals, a state court decision is "contrary to" federal law only when it "arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or "decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362,412-13 (2000); see also *Biros v. Bagley*, 422 F.3d 379, 386 (6th Cir. 2005) (following *Williams*). A state court decision is an "unreasonable application" of federal law when it "identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413.

Factual findings made by the state court, or by state appellate courts based upon the trial record, are presumed to be co but may be rebutted by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *Biros*, 422 F.3d at 386; *Bugh v. Mitchell*, 329 F.3d 496, 500 (6th Cir. 2003). If a state court has failed to review a particular claim, AEDPA's deferential standard does not apply so courts must conduct a de novo review. *See McKenzie v. Smith*, 326 F.3d 721, 727 (6th Cir. 2003).

III. ANALYSIS

A. Failure to Investigate Claim

The Report concluded that the decision of the Michigan Court of Appeals, denying Petitioner's ineffective assistance of counsel claim based on a failure to investigate, represents an unreasonable application of clearly established Supreme Court authority. Respondent argues that the Magistrate

Judge improperly substituted her judgment for that of the Michigan courts and that Petitioner's trial attorney was justified in not pursuing an alibi defense. The Court finds Respondent's arguments to be without merit.

The Supreme Court's landmark decision in *Strickland v. Washington,* 466 U.S. 668 (1984), qualifies as "clearly established federal law" under 28 U.S.C. § 2254(d). *See Williams*, 529 U.S. at 391. Thus, if Petitioner can show that the Michigan courts adjudicated his failure to investigate claim in a manner contrary to *Strickland*, he is entitled to habeas relief. To be successful on an ineffective assistance of counsel claim, *Strickland* requires that two elements be proven. First, a petitioner must demonstrate that his attorney's performance was deficient. *Strickland*, 466 U.S. at 687; *see also Combs v. Coyle*, 205 F.3d 269, 278 (6th Cir. 2000) (holding that judicial scrutiny of attorney performance must be "highly deferential"). To prove a deficiency, a petitioner must show that his attorney's conduct fell "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. To satisfy *Strickland's* second element, a petitioner must show prejudice resulting from his attorney's deficient performance, meaning that there exists "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.*

1. Deficient Performance

Regarding the first prong of the *Strickland* Test, an attorney's performance is deemed deficient if the attorney fails to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Id.* at 691. "In any

ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* Thus, the "relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores Ortega,* 528 U.S. 470, 481 (2000) (citing *Strickland*, 466 U.S. at 688).

In this case, Petitioner told his trial attorney, David Lankford, that he could not have committed the murder. (Hr. Tr. 27, Nov. 2, 2001.) Petitioner's purported alibi was that he was 30 minutes away from the scene of the murder at the time it occurred waiting on his car to be repaired at Crimes Towing and Auto Shop. (*Id.*) Petitioner provided Lankford with the names of three witnesses who could attest to his whereabouts on January 15: John Crimes Sr., LaVelle Crimes, and Damar Crimes. (Hr. Tr. 22-23, Sept. 7, 2001.) Petitioner also provided the business address of Crimes Towing and told Lankford that he could contact the three individuals there. (*Id.*) Petitioner showed Lankford a receipt from Crimes Towing, dated January 15, further corroborating his story. (*Id.* at 25-26.)

According to Lankford's *Ginther* hearing testimony,[2] he thereafter sent an investigator to Crimes Towing. (*Id.* at 23, 27.) The investigator spoke only with LaVelle Crimes, who stated that Petitioner left Crimes Towing sometime in the "mid-afternoon" of January 15 with LaVelle's brother, Damar Crimes. (*Id.* at 24-27.) LaVelle told the investigator that the pair "went to Damion's house on Ardmore [Street]" and returned to Crimes Towing around 9:15 p.m. or

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[2]Lankford's investigator did not testify at the *Ginther* hearing.

9:30 p.m. (*Id.* at 24-25.) The investigator did not ask LaVelle, or anyone else for that matter, if he had contact information for Damion or Damar. (*See id.* at 29-33.) Lankford believes that the investigator left his card with someone at Crimes Towing "with the request that Damar and/or Damion contact us," but does not know this for certain. (*Id.* at 26-27, 29.)

As he was preparing Petitioner's case for trial, Lankford came to believe the prosecution had a weak case and that an alibi would bolster Petitioner's chances of acquittal. (*Id.* at 39-40, 43.) Based on this, Lankford instructed his investigator to again attempt to contact the individuals identified by Petitioner as well as visit Crimes Towing one more time. (*Id.* at 26-28.) It is unknown to Lankford whether the investigator complied with this request. (*Id.*) Lankford never contacted any of the individuals on his own or went to Crimes Towing. (*Id.* at 31.)

Damar Crimes' testimony at the *Ginther* hearing revealed that he went to Crimes Towing every day and never received a telephone call or home visit from Lankford or his investigator. (Hr. Tr. 34, Sept. 28, 2001.) Testimony revealed that Damar's father told him that an investigator stopped by Crimes Towing, but Damar never received a business card from the investigator. (*Id.* at 13-14.) Instead, Petitioner's sister gave Damar a hand-written piece of paper with Lankford's number on it. (*Id.* at 14.) Damar tried to call the number; however, he testified that it was a wrong number. (*Id.*) According to Damar, he was never contacted by Lankford or his investigator. (*See Id.* at 13-14.) Further, had he been called at trial, he would have provided an alibi for Petitioner during the evening of January 15, including between 7:30 p.m. and 8:00 p.m., in that he was with Darius Boyd (Damion's Brother) and Petitioner at a location 30 minutes away from the murder scene. (*Id.* 9-11.)

When Darius Boyd[3] testified at the *Ginther* hearing, he corroborated Damar's and Petitioner's account of what took place on January 15, lending further support to Petitioner's alibi defense. (Hr. Tr. 8-9, Nov. 2, 2001.) Darius also indicated that he was never contacted by Lankford or his investigator. (*Id.* at 10; Hr. Tr. 10, Sept. 28, 2001.)

Lankford never indicated to Petitioner that he was having trouble contacting witnesses. (Hr. Tr. 24, Nov. 2, 2001.) Instead, Petitioner testified that Lankford told him that "he didn't think they was [sic] good enough to use and then he said when we got to trial he said he don't [sic] think we need 'em [sic], cause [sic] they didn't have a case against me." (*Id.*) Lankford argues that he made a reasonable strategic decision to not place Damar or Darius on the witness stand because he was unsure what they "would say or how they would present." (Hr. Tr. 32, Sept. 7, 2001.)

"Constitutionally effective counsel must develop trial strategy in the true sense—not what bears a false label of 'strategy'—based on what investigation reveals witnesses will actually testify to, not based on what counsel guesses they might say in the absence of a full investigation." See *Ramonez v. Berghuis,* 490 F.3d 482, 489 (6th Cir. 2007). The Michigan Court of Appeals held that Lankford "made a valid strategical decision not to present such a defense because the

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[3]In retrospect, it appears from the record that Damion was not with Petitioner during the night of January 15, as suggested by LaVelle. (*Id.* at 22.) Instead, Petitioner was with Darius. (*Id.*) Upon speaking to Damion or Damar, however, the investigator would have discovered this. (*See* Hr. Tr. 13, Nov. 2,2001.)

information he obtained did not provide defendant with an alibi for the time of the crime." *People v. Avery,* No. 229324, 2002 WL 31264726, at *1 (Mich. Ct. App. Oct. 8, 2002). In so stating, the Michigan Court of Appeals focused on the statements given by LaVelle, which indicated that LaVelle did not have firsthand knowledge of Petitioner's location between the time Petitioner left Crimes Towing in the mid-afternoon and around 9:15 p.m. to 9:30 p.m. However, the Michigan Court of Appeals' conclusion is unjustified. Lankford's duty to investigate "includes the obligation to investigate all witnesses who may have information concerning his [ ] client's guilt or innocence." *Towns v. Smith,* 395 F.3d 251,258 (6th Cir. 2005). Even though LaVelle was unable to provide the investigator with an alibi for Petitioner at the time the murder was committed, LaVelle identified two other potential alibis—Damar and Damion. (Hr. Tr. 24-25, Sept. 7, 2001.) Upon learning this information, Lankford was under a duty to interview these witnesses.[4]

The Michigan Court of Appeals' decision is objectively unreasonable based on the established Supreme Court authority discussed herein. This Court finds no reasonable decision made by Lankford justifying his failure to contact Damar since he was explicitly mentioned as an alibi witness by Petitioner. Lankford himself initially recognized that Damar might serve as an important witness. (Hr. Tr. 14-15, 34, Sept. 28, 2001.) Further, had Lankford or his

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[4]The Court notes that Lankford was under a duty to contact Damar before his investigator spoke to LaVelle because Petitioner identified him as an alibi witness. LaVelle's statement to Lankford's investigator further magnified the need to speak to Damar.

investigator spoken with Damar, Damar could have provided information about Darius, another potentially important witness. (*Id.* At 9-11.) After his investigator spoke to LaVelle, Lankford's duty to make a reasonable investigation was not complete, it was just beginning. "Where counsel fails to investigate and interview promising witnesses, and therefore ha[s] no reason to believe they would not be valuable in securing [defendant's] release, counsel's inaction constitutes negligence, not trial strategy." *Workman v. Tate,* 957 F.2d 1339, 1345 (6th Cir. 1992) (citations omitted); *see also Nealy v. Cabana,* 764 F.2d 1173, 1177 (5th Cir. 1985) (finding that "counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case").

Just as Lankford's duty to investigate did not end upon his investigator contacting LaVelle, it also did not end when the investigator left his business card at Crimes Towing, although whether this actually occurred is disputed. The Court cannot find that Lankford exhibited "reasonableness under prevailing professional norms." *See Strickland,* 466 U.S. at 688. In so holding, the Court is not holding that Lankford or his investigator actually had to *speak* with Damar. Damar could have purposely avoided speaking with them and Lankford could have done little about this. This was not the situation, however, as Damar testified that he would have spoken with them and also testified at Petitioner's trial. (Hr. Tr. 20, Sept. 28, 2001.) Lankford was under a duty to reasonably investigate, which entails, at the bare minimum, asking for Damar's phone number or address and reasonably attempting to contact him. As Petitioner appropriately notes, "[t]his sequence of events shows just how unreasonable it was for a seasoned attorney like Lankford to leave it up to teenagers to get back in

touch with him about important alibi evidence in a murder trial." (Br. Pet, for Writ of Habeas Corpus 20.)

2. Prejudice

After finding deficient performance on the part of Petitioner's trial counsel, the Court must determine whether prejudice necessarily results therefrom. Prejudice results if there exists "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See Strickland,* 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* The Michigan Court of Appeals did not reach this question since it concluded that Lankford was not ineffective. *See People v. Avery*, No. 229324, 2002 WL 31264726, at *2 (Mieh. Ct. App. Oct. 8, 2002). Thus, the Court analyzes the matter *de novo.* See *Rompilla v. Beard*, 545 U.S. 374, 390 (2005).

Had Lankford interviewed all of Petitioner's potential alibi witnesses and had them testify at trial, this Court cannot say that the result of Petitioner's trial would have been the same. There is a sufficient probability that the verdict would have been different, which undermines this Court's confidence in the verdict. If Damar's testimony was believed by the jury, it would be almost impossible to find Petitioner guilty. "[O]ur Constitution leaves it to the jury, not the judge, to evaluate the credibility of witnesses in deciding a criminal defendant's guilt or innocence." *See Ramonez*, 490 F.3d at 490. "[W]eighinh the prosecution's case against the proposed witness testimony is at the heart of the ultimate question of the *Strickland* prejudice prong, and thus it is a mixed question of law and fact not with the Section 2254(e)(1) presumption." *Id.* at 491.

In deciding that Petitioner was prejudiced, the Court places emphasis on the weak evidence resulting in

Petitioner's verdict. *See Strickland*, 466 U.S. 696 (concluding that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support"). The prosecution's case against Petitioner relied heavily on the inconsistent and suspect eyewitness testimony of Jaeklyn Barker. Barker testified that between 7:30 p.m. to 8:00 p.m. on January 15, she heard a car pull up in front of her house. (Trial Tr. 70, June 27, 2000.) Upon going to the door to see who was there, she heard a "pop," which she thought was a gunshot. (*Id.* at 71-72.) She then "peeked" through her glass door and saw three men emerge from a car, which was later identified as the victim's car. (*Id.* at 72-74.) It was dark outside and part of the car was in a shadow from a streetlight across the road. (*Id.* at 70-7 1, 87-88, 95.)

Nevertheless, Barker testified that she saw Petitioner exit the car from the front passenger seat, which was facing away from her house, even though she only saw Petitioner for "a few movements" and "couldn't see his face." (*Id.* at 74-76.) Although Barker testified at the preliminary hearing that Petitioner was smiling when he exited the car (Pre. Hr. 12, Feb. 23, 2000), she changed her testimony at trial and admitted that she could not see Petitioner's facial expression. (Trial Tr. 75-76, June 27, 2000.) When asked by the prosecutor why her testimony had changed, she denied previously lying and could only respond "I don't know." (*Id.* at 76.) The Court can decipher no reason for this inconsistency.

When she was questioned on the night of the murder, Barker told the police that she did not recognize the individuals who exited the car. (*Id.* at 103-05.) A day or two later, however, Barker remembered who the men were but did not

immediately tell the police because, she suggests, she was afraid. (*Id.* at 79-80.) Moreover, Barker later testified that she has known Petitioner, as well as the other two men, from her neighborhood since she was little. (*Id.* at 73-74.) These inconsistencies lead the Court to conclude that the prosecution's case against Petitioner was weak and that there is a sufficient probability that an alibi defense would have likely resulted in a different verdict. On January 19, 2000, Barker failed to pick any of the three men out of a lineup, but did pick another individual out of one of the lineups, although this individual was never charged. (*Id.* at 106-08.) Barker failed to provide a sufficient explanation for why she did not pick Petitioner out of the initial lineup, given that she has known him most of her life.

Of course, the Court does not intend to assess the credibility of Barker; rather, the Court simply finds that Barker's inconsistent statements, unexplainable actions, and the conditions surrounding her "eyewitness testimony" gave the prosecution a very weak case on which to convict Petitioner. Because of the weakness of the prosecution's case, the Court finds that there is a sufficient probability that, but for Lankford's failure to pursue an alibi defense, the verdict would have been different. It is apparent to the Court that had an alibi witness been produced, the jury could have discredited Barker's testimony and acquitted Petitioner.

B. Failure to Object Claim

Petitioner argues that his second claim for habeas relief, involving improperly admitted hearsay testimony, was erroneously denied in the Report. At Petitioner's trial, a witness testified to a statement made by Petitioner's co-defendant, Recho Burns, which

indicated that Burns threatened to kill the victim. Before trial, the prosecutor moved to admit this testimony but the court denied the motion since the testimony did not relate to Petitioner. At trial, however, the prosecutor admitted this evidence despite the court's earlier ruling. Petitioner's trial counsel failed to ask for the jury to be excused, object, or request any type of limiting instruction.

There is no question that Petitioner's counsel erred; however, the question is whether Petitioner suffered prejudice. The Michigan Court of Appeals and the Magistrate Judge both concluded that Petitioner did not. For the reasons set forth in the Report, the Court finds that Petitioner suffered no prejudice. Specifically, no mention was made of Petitioner in the testimony and Petitioner was in no way implicated. The jury was appropriately instructed to only consider evidence properly admitted against Petitioner, which would not be this testimony. Petitioner has not met the demands of 28 U.SC. § 2254(d).

C. Certificate of Appealability

Pursuant to 28 U.S.C. § 2253, the Court must also assess whether to grant the issuance of a certificate of appealability to Petitioner on his failure to object claim against his trial attorney. *See Castro v. United States*, 310 F.3d 900, 903 (6th Cir. 2002) (holding that § 2253 analysis may be done at the time the claim for relief is determined). Under the statute and the United States Supreme Court's determinations in *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000), and *Barefoot v. Estelle,* 463 U.S. 880, 893 & n.4 (1983), a certificate shall issue if the resolution of the petition is debatable among reasonable jurists or adequate to deserve

encouragement for some other reason. Furthermore, the analysis of the sufficiency of the claims must be individually directed to the substance of the constitutional claims asserted. *Murphy v. Ohio,* 263 F.3d 466, 466-67(6th Cir. 2001); *Porterfield v. Bell,* 258 F.3d 484, 486 (6th Cir. 2001).

Upon review, the Court finds that reasonable jurists would not find Petitioner's positions debatable with respect to the substantive grounds for denying relief as to the claim asserted. Accordingly, a certificate of appealability will be denied on Petitioner's failure to object claim.

IV. CONCLUSION

For the reasons set forth above, a Writ of Habeas Corpus shall enter granting Petitioner Chamar Avery's Petition for Writ of Habeas Corpus, instructing the State of Michigan to either release Petitioner from custody or afford hi a new trial within 120 days, adopting the Report and Recommendation, denying Respondent John Prelesnik's Objections to the Report and Recommendation, denying Petitioner's Objections to the Report and Recommendation, and denying a certificate of appealability as to Petitioner's failure to object claim.

DATED in Kalamazoo, MI:
November 8, 2007

/s/ Richard Alan Enslen
RICHARD ALAN ENSLEN
SENIOR UNITED STATES
DISTRICT JUDGE

Order

Michigan Supreme Court
Lansing, Michigan

Entered: April 29, 2003

122602

Maria D. Corrigan,
Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young
Stephen J. Markman,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee

v

SC: 122602
COA: 229324
Wayne CC: 00-002750

CHAMAR AVERY,
Defendant-Appellant.
/

On order of the Court, the application for leave to appeal from the October 8, 2002 decision of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 29, 2003 *s/ Corbin R. Davis*
Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

V

CHAMAR AVERY,

Defendant-Appellant.

UNPUBLISHED
October 8, 2002

No. 229324
Wayne Circuit Court
LC No. 00-002750

Before: Meter, P.J., and Saad and R. B. Burns*, JJ

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree murder, MCL 750.317. The trial court sentenced defendant to twenty to fifty years in prison. We affirm

Defendant argues that the trial court erred in admitting the testimony of Victor Budd, which indicated that codefendant, Recho Burns, threatened to kill the victim, Geoffrey Stanca. On appeal, he contends that the evidence was irrelevant and unduly prejudicial. Defendant also argues that the evidence was inadmissible hearsay and that admitting the evidence deprived him of his right to confrontation.

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Before trial, the prosecutor moved to admit the testimony on the basis of MRE 404(b). The court denied the motion on the basis that Budd's testimony did not specifically relate to defendant. However, at trial, the prosecution introduced this evidence despite the court's earlier ruling, without an objection from defense counsel. Defendant's failure to raise a timely objection to Budd's testimony means that we review the alleged error under the plain error rule. To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain and 3) the plain error affected substantial rights. *People v Pesquera,* 244 Mich App 305; 625 NW2d 407 (2001).

Here, while we agree that the evidence was improperly admitted, we conclude that the error did not affect defendant's substantial rights because Budd's testimony did not prejudice defendant. Accordingly, we decline to reverse on this ground.

Defendant also contends that he was denied the effective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Defendant first argues that defense counsel was ineffective for failing to renew an objection to the admission of Budd's testimony that Burns threatened to kill Stanea, or to request that the jury be removed during Budd's testimony. While counsel may have erred, we conclude that defendant has not shown a reasonable probability that, but for counsel's error, the result of the proceedings would have been different.

Also, defendant says that defense counsel was ineffective for failing to adequately investigate and present an alibi defense. Specifically, defendant asserts that counsel should have made more efforts in securing alibi witnesses. Failure to call witnesses will only constitute ineffective assistance of counsel if the failure deprives the defendant of a substantial defense. *People v Hyland,* 212 Mich App 701; 538 NW2d 465 (1995). A defense is substantial if it might have made a difference in the outcome of the trial. *Id.*

At the *Ginther*[i] hearing, counsel testified that his investigator went to crimes Towing and Auto Service, the location where defendant said the witnesses could be located. While defendant complains that counsel failed to contact Damar Crimes, the investigator did in fact locate and interview another one of the potential witnesses and left his business card with a request that the other potential alibi witnesses contact him. Counsel also had his investigator follow up by telephone and again in person, in an attempt to contact these other witnesses. Given these circumstances, we conclude that counsel adequately investigated. Moreover, counsel made a valid strategical decision not to present such a defense because the information he obtained did not provide defendant with an alibi for the time of the crime. Accordingly, we conclude that defendant has not sustained his claim of ineffective assistance of counsel.

Defendant further argues that he was denied a fair trial due to prosecutorial misconduct. Allegations of prosecutorial misconduct are reviewed de novo. *People v Pfaffle,* 246 Mich App 282, 288; 632 NW2d 162 (2001). The reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context to determine if the defendant was denied a fair and impartial trial. *Id.*;

People v Reid, 233 Mich App 457, 466; 592 NW2d 767 (1999).

Defendant argues that the prosecutor made comments during opening statement that improperly shifted the burden of proof. A prosecutor may not imply that a defendant must prove something or present a reasonable explanation because such an argument tends to shift the burden of proof. *People v Guenther,* 188 Mich App 174, 180; 469 NW2d 59 (1991). In context, the prosecutor's comments were not improper, though they did, as the trial court mentioned, tread near being improper. Before the court stopped the prosecutor, the prosecutor explained the types of defenses that are typically used in such cases. The comments were not so egregious as to shift the burden of proof. Moreover, had the statement improperly shifted the burden of proof to defendant, the trial court properly instructed the jury that defendant was not required to prove his innocence or to do anything. Juries are presumed to follow their instructions. *People v Graves,* 458 Mich 476, 486; 581 NW2d 229 (1998). Therefore, it is unlikely that the prosecutor's conduct resulted in a miscarriage of justice. *People v Lukity,* 460 Mich 484, 495; 596 NW2d 607 (1999).

Finally, defendant alleges that he should be resenteneed because the court used the wrong sentencing grid. He maintains that his offense variable level should have been a I, rather than a II, because no points should have been assessed for offense variable six (OV 6). We disagree.

The court determined that this was a level II offense, because fifty points could be assessed for OV 6. MCL 777.36 provides that OV 6 should be scored fifty points if the offender had a premeditated intent to kill or the killing was committed while committing or

attempting to commit enumerated offenses including robbery. MCL 777.36(2)(a) provides that the sentencing judge shall score this variable consistent with a jury verdict unless the judge has information that was not presented to the jury.

The prosecutor originally charged defendant with felony murder and possession of a firearm during the commission of a felony. The jury convicted defendant of the lesser included offense of second-degree murder. Thus, the jury did not find that defendant committed a robbery at the time of the killing despite the evidence presented that he did. Moreover, there is no information that the judge had information that was not presented to the jury. Therefore, because the court was required to score offense variable six consistent with the jury verdict, the trial court erred in adding fifty points for OV 6.

Nevertheless, defendant is not entitled to resentencing. MCL 777.36 provides that twenty-five points can be scored for offense variable 6 if the defendant had "unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result." Defendant's second-degree murder conviction supports a scoring of twenty-five points for OV 6. Second-degree murder is a general intent crime, which requires proof that the killing was "done with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm." *People v Herndon,* 246 Mich App 371, 386; 633 NW2d 376 (2001). Had the trial court applied the twenty-five points instead of fifty points, the same sentencing grid would have been used. MCL 777.61. Therefore, defendant is not entitled to resentencing. Moreover, given these circumstances,

defendant was not denied effective assistance of counsel at sentencing because any objection to using the sentencing grid would have been futile. *People v Rodriguez*, 212 Mich App 351, 355-356; 538 NW2d 42(1995).

Affirmed.

/s/ Patrick M. Meter
/s/ Henry William Saad
/s/ Robert B. Burns

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[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973)

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR

THE COUNTY OF WAYNE

CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN,

File No. 00-02750

vs.

Motion

CHAMAR AVERY,

Defendant.
_____/

PROCEEDINGS TAKEN in the above-entitled cause, before the HONORABLE KYM L. WORTHY, Judge of the Recorder's Court, City of Detroit, at Frank Murphy Hall of Justice, Courtroom 502, Detroit, Michigan, on November 2; 2001.

APPEARANCES:

DEBORAH BLAIR, Assistant Wayne County Prosecutor, appearing on behalf of the People.

CHARI GROVE, Attorney-at-Law, appearing on behalf of the Defendant.

* * *

BRION COURY, CSR-0038
Official Court Reporter

I N D E X

WITNESSES	PAGE
DARIUS BOYD	
Direct Examination by Ms. Grove	05
Cross Examination by Ms. Blair	12
CHAMAR AVERY	
Direct Examination by Ms. Grove	16
Cross Examination by Ms. Blair	25
Redirect Examination by Ms. Grove	27
Recross Examination by Ms. Blair	30

MS. GROVE: He made some assumptions, but all he had in his notes were all that we have that is documented is the fact that he left a card and we have testimony that -- from Damar and Darius that they were never contacted, but whatever assumptions the attorney made is certainly on the record, but we don't have any evidence of what his investigator actually did and, again, it would have been easy and, again, Darius' testimony, combined with the testimony of the other witnesses does pinpoint the date and time, and three people could have testified at trial that at the exact time of the shooting, Chamar Avery was with Darius and Damar and --

THE COURT: One of these witnesses, counsel -- and I realize that you are not arguing that Mr. LaVelle Crimes is -- was an alibi witness. Certainly that was the witness that appeared at court order. That was the witness, anyway, that Mr. Lankford personally interviewed and he, in fact, provided the opposite, very detrimental information as related to your client.

In fact, the information that was taken from that witness is that there was like a hundred and -- there was a stipulation there was like a hundred and seventy-six dollars or something like that taken in the robbery that resulted in the death of the complainant and that the bill for the car that Mr. Avery owed was like a hundred and twenty-five dollars according to the exhibit that I have and according to the testimony, the proffered testimony of Mr. LaVelle Crimes it would have been that he, meaning the Defendant, paid his bill in cash with just under the amount of money that was taken in the robbery less than thirty minutes after the robbery would have occurred.

Evidence, if presented by Mr. Lankford, would have been even further devastating to your client so I guess -- I mean, he made a strategical decision at that point, very wise one I might add, not to put that witness on the stand who would have provided a direct linkage as to how your client got the money to pay for his car because the testimony was that the robbery happened between seven thirty and eight P.M., I believe, and even if I accept your client's rendition and the other person's rendition as to the time at eight thirty they were headed back to Crimes Towing a half an hour, according to the time line after the robbery in which enough money, sufficient money, s gotten to pay for his car.

MS. GROVE: Well, your Honor, I think at trial after that argument had been made by the prosecutor it could have easily been answered and again we have the testimony of Mr. Avery as to how he got the money to pay for his car. His mother gave him the money. It was cash because Mr. Avery is a high school student. He didn't have a checking account.

THE COURT: That's what he says. I'm simply pointing out some of the other things that come out that Mr. Lankford didn't present because that, in my view, would have been a very strong argument that there was a robbery, slash homicide occurred a half an hour prior to when your client walks into Crimes Towing to pay for his car.

MS. GROVE: Well, my argument is not that LaVelle Crimes --

THE COURT: I understand that and I said that.

MS. GROVE: Okay

THE COURT: But I'm saying that you're saying that this lawyer was ineffective, but I see indications from what he did that point in the opposite direction, but I've heard enough. I understand the arguments. I cannot find -- I don't even think it's close, frankly. I can't find that Mr. Lankford, Mr. David Lankford, was ineffective.

Frankly, what I find from my recall of the facts in this case is that it was almost a miracle that your client got convicted only of murder in the second degree and maybe it was because of the vast impeachment and I wouldn't even call it vast, but because of the impeachment that was done on the identification witnesses, so in my view and taking an objective view, I didn't try the case, but taking an objective view, I certainly did the pretrial matters of this case, I'm wondering how he got convicted only of murder two and I can only figure that Mr. Lankford had something to do with the fact that your client is not going to spend the rest of his life in prison.

Let's deal specifically with the issue that you brought forth that Mr. Lankford was deficient and he was ineffective in representing your client such that since your client allegedly told him that the existence of these alibi witnesses and that's not exactly true and I'll go through that in a minute based on my notes, on the day of the preliminary examination, and providing him this exhibit, People's Defense Exhibit A that was admitted into evidence on the 7th of September of this year which, by the way, does have a date, but no time on it, as it relates to -- unless I'm missing it on here, and it says that Chamar Avery, his address, phone number, describe a '79 Olds CALN, I don't know what that is, but in any event, on the 15th, needing a wheel

alignment and that the total bill was a hundred and twenty-five dollars.

Mr. Damar Crimes testified that he is a friend of the Defendant; has been a friend since they were five years old; that he recalls him, the Defendant, being in the shop on the -- in January, 2000. The car was, in fact, there on the 15th between five thirty and six P.M.; that he left Crimes Towing with the Defendant at seven P.M. and then there was -- there was kind of a waffling on the time there, but he later says that it was between six thirty and seven which would be closer in time to the time of the murder; that they went over to a friend's house, Darius Boyd's house, between seven and seven thirty which gets even closer to the time of the murder, but they walked there; that his brother Mr. Boyd's brother, I think his name was Damion, that they waited there until the car was ready and this was between eight and eight thirty P.M.; that he was with the Defendant the whole time; that they walked back to Crimes Towing and got, there before nine o'clock.

They left Crimes Towing between nine -- excuse me, around nine P.M. They went to -- this is his -- a girl's house and stayed there until about nine thirty. The woman's name was Tamela (ph) Jordan, I believe. Mr. Crimes further testified to -- and this is Damar -- that Mr. Lankford never spoke to him about this day, that someone -- he knew that someone had spoken to his brother because his father told him and told him well in advance of the trial.

He didn't know who had spoken to LaVelle, but he knew that LaVelle had been spoken to because his father told him. Again these are people from the same family. Mr. Crimes said that he was given a phone number, but when he called the number it was the wrong number and that he knew

where -- that LaVelle certainly knew about him and that they had voice mail, but he acknowledged getting -- this is Damar -- he acknowledged having the number of Mr. Lankford prior to the trial and that was directly through Mr. Lankford's efforts and the efforts of the investigator.

He indicates that he made that one phone call and that was basically it. He called one time. He says it was the wrong number and that he said one month after January 2000 he got apiece of paper with Mr. Lankford's name on it from the Defendant sister and the witness said apparently it was a different number or something, but in any event, Mr. Crimes said he told the sister that it was the wrong number and then nothing else was done.

Then I asked him a question, and this is why the time was important to me, when did the Defendant drop off his car at Crimes Towing and he said it was the 15th of January, that Saturday, and it was at about five thirty to six P.M. This came from Mr. Damar Crimes, the person that your client says that he was with during the entire time and that was basically the testimony of Mr. Damar Crimes.

Then we heard from -- or the first witness may have been Mr. Lankford. I don't remember at this point, .but in any event, we did hear from Mr. Lankford. He was the defense attorney. He saw the Defendant on the 11th of February. Strike that. I'm sorry. He testified that the date of the offense was the 15th of January, 2000, and he testified somewhere between seven and eight P.M. basically was the time; that when he met with his client, Mr. Avery, Mr. Avery gave him the names of possible alibi witnesses; that then the Defendant's lawyer, Mr. Lankford, made attempts to find these witnesses.

The Defendant gave him a business address which we later find out was Crimes Towing where these witnesses could be located. He sent out an investigator to the area, to the address, to the business where Mr. Avery said these witnesses could be located. The names that were given were LaVelle Crimes, Damar Crimes and John Crimes, Jr. There's another name that was given to help find the three actual people who did this according to Mr. Chamar Avery.

At Crimes Towing when the investigator went out he talked with LaVelle Crimes Mr. Damar Crimes' brother and, by the way, no address was given for Crimes Towing. The investigator found that. I imagine that wouldn't be too difficult, but he did find out where it was located through his, investigation. The investigator was given explicit instructions from Mr. Lankford about what to do.

The investigator then subsequently also took a statement from Mr. LaVelle Crimes and the statement has been admitted as Court's Exhibit Number One because I wanted to see it and then that's when the evidence about the card was left and the investigator requested of the Defendant's -- - Mr. Damar Crimes' brother, Mr. LaVelle Grimes -- Crimes, I keep saying Grimes -- to contact the investigator, but that's not all that took place as counsel seemed to indicate during her argument.

The interview with Mr. LaVelle Crimes occurred on the 23rd of May. The investigator called back to check on at least two occasions and he was also instructed to go back out again to check on the existence of Damion Boyd whose name LaVelle Crimes gave the investigator. That information didn't even come from the Defendant.

That came through the investigation that the investigator did it on the behest of Mr. Lankford Because Mr. Avery was unable to provide any phone numbers or addresses for either Damion Boyd -- well, actually that name was never given by the Defendant.

That was given by LaVelle Crimes or Darius Boyd. The trial date was initially in early June and it didn't go to trial until the end of June. Mr. Lankford discussed how he -- or testified how he discussed potential defenses with the Defendant; that his primary defense was one of identification. His defense was that the Defendant was not the one that was involved. It was mistaken identification and one of his main strategies -- or his main strategy was to attack, which he did, and that's evident throughout the trial, the testimony and impeached the testimony of the identification witness in this case.

Mr. Lankford testified that he's been an attorney for twelve years. His license was never suspended. It was active and current; that he had handled over three hundred felony trials. He conducted about forty thirty-five to thirty-six murder trials, he estimated; that in that time he was employed by the Defender's Office and he specifically, Mr. Lankford, requested the investigator that he sent out to Crimes Towing, because he was the one that he had worked with in the past. He was very good. He had always been more than satisfied with his work and never had any trouble with the investigator not doing what he was told to do.

He acknowledges that Mr. Avery is, in fact, the one that initially brought up the alibi defense and that's why he sent the investigator out. Now, when he talked to, the investigator did, LaVelle Crimes, Mr. LaVelle Crimes could not provide

an alibi for between seven and eight P.M. Only between three thirty and four and approximately nine thirty to ten, but also LaVelle Crimes provided also some very interesting information and that was that the Defendant paid in cash and the time frame would have been less than thirty minutes after this robbery homicide occurred, about the period of time that even your client suggests that it would have taken him to get from the murder scene to Crimes Towing.

In my view, and I've been doing this a long time, in my view that would have been devastating evidence that your client was, in fact, directly involved with a first degree premeditated murder so Mr. Lankford very intelligently decided not to call that witness and didn't because I asked him. I said, wouldn't that have provided some additional information that, in fact, your client was directly involved; that he is -- because the testimony was that there was a hundred and seventy-six dollars taken in that robbery, a hundred and seventy-six dollars and eighty cents taken in the robbery and the Defendant owed Crimes Towing a hundred and twenty-five dollars to get his car.

I'm pointing this out because it's really hard for me to grasp how, when Mr. Lankford makes what I think is cogent decisions throughout the course of the trial and what he was testifying to that he was very much aware of what his role was. He's very experienced and I know him to be a very good lawyer and he made a decision to focus on one main identification and still didn't rule out the additional defense of an alibi because, of course, if you have a lack of identification or your defense is - mistaken I.D. it always will be helpful if you could have an alibi witness to suggest that the Defendant was somewhere else and I understand that argument the defense is making.

It would have made perhaps the Defendant's position strong, but also strategically as Mr. Lankford testified, it's always best if you can focus on one defense and not the other, but he wasn't certainly going to rule out the possibility of an alibi defense which is why he sent his investigator out there so it's not as if his investigator went out there one time and left one card.

There was a follow up, several follow ups and another visit out trying to look for these witnesses who were related and live in the same house as the witness that was talked to. Further, there was also testimony of the other work that Mr. Lankford did on the case that's a matter of record, the other motions that he filed which the motion practice in this case was numerous.

For someone to suggest that Mr. Lankford didn't do a good job is -- well, anyway, Darius Boyd testified that he was with -- I'm sorry, that Mr. Avery and Mr. Crimes, Mr. Damar Crimes came over to his house on the day in question, although he testified that he didn't -- initially he remembered the year then when he was asked.

He narrowed that down to winter and then when I asked him he narrowed it down to a weekend and the first -- at my behest counsel asked him if he could narrow it down any further. I understand counsel's argument that even though he can't remember the day, the facts that he does remember sufficiently tie into the fact that we could only be talking about the same day, but the reason that's important to me as the fact finder to consider, and when I look at credibility, I find it very difficult to reconcile in my mind that a person can remember the exact time and time frames when things occurred and can't even tell me the day of the week that these things occurred, let alone the date, so I

understand that your argument about, well, it could only be this one date because he only came over to the house one time, the two men only came over to Mr. Boyd's house one time and it was the same -- that they were waiting for the car.

I understand that argument, but again the fact finder, I have to wonder just how much he remembers, if he can remember the times, the exact times of the occurrences on two different time frames when he can't even remember the day and initially didn't even remember the season until he was basically prompted, until I stepped in.

So I find that to be totally incredible and what it suggests to me is a manufacturing of testimony. It suggests very strongly to me a manufacturing of testimony when someone's memory is so deficient in every other area except time which happens to, and credibly in my view, matched the time of the other witnesses so I have some concerns and questions about -- and credibility issues about the testimony of Mr. Boyd and especially having watched him and his demeanor on the stand at the same time which I had the benefit of doing this morning.

So again, I don't find the, testimony of these alibi witnesses to be so consistent. In fact, they are incredibly inconsistent on some basic times and the fact that witnesses can remember certain facts and credible detail that match other witnesses, but can't remember some other basic information gives me pause as to the veracity of these witnesses.

Now, counsel argues to me also that if, in fact, these witness's testimony were taken at the time of the trial, perhaps the memories

wouldn't be so fleeting, I guess for lack of a better word, and maybe it's not, but after Mr. Lankford interviewed one of the witnesses and determined that his witness's testimony would not only be helpful for an alibi defense, but would be devastating to whether his client would be convicted of the crime charged, I think the way he conducted himself was more than adequate, was very good.

In looking at the totality of how he handled the trial and of course I did review that so the bottom line is I don't find Mr. Lankford was even close to being ineffective. I find that he focused on one defense and did a good job on that defense. The fact that the jury happened to disagree and convict him of a lesser charge is neither here nor there as far as their decision is made.

It's evident to me that there are some things that Mr. Lankford did that could have suggested that that's the reason why Mr. Avery was not convicted of the charged offense and, further, he made some other decisions that would have certainly hammered that in my view. He made attempts to find -- to contact these witnesses that the Defendant says would provide alibi witnesses, but in looking and listening to two of these witnesses and finding their testimony to be actually -- when I say two witnesses, I'm including the Defendant, but looking at the exhibit, of the statement of Mr. LaVelle Crimes that was taken by the investigator, I can't say that this would have resulted in a different result at all and let's be clear on something.

Counsel says, well, no, she wasn't really relying on the testimony of LaVelle Crimes, but that was one of the names that the Defendant gave his lawyer, Mr. Lankford. Along with John, Jr., and Damar and Mr.

LaVelle Crimes' statement matches in no way the testimony of Mr. Damar Crimes.

In fact, it's totally inconsistent and the Defendant has some issues also. With his testimony that is inconsistent so your motion is denied for the reasons I've stated.

MS. GROVE: Thank you, your Honor.

MS. BLAIR: Thank you.

MS. GROVE: Did you want to address the sentence?

THE COURT: Let's go ahead and address it.

MS. GROVE: Well, simply at sentencing the guidelines --

THE COURT: Oh, let me just add one thing. And also it's interesting that the testimony is also different from the affidavits that were submitted as well. Okay. Go ahead.

MS. GROVE: Your Honor, at sentencing there was no disagreement that the prior record variables were zero, that the PRV level was A, but the attorney did point out under the offense variables, offense variable three should not have been scored and that the one hundred points should be subtracted.

THE COURT: Making the bottom

144

(3)

NO. 08-1389

IN THE SUPREME COURT OF THE UNITED STATES

JOHN PRELESNIK, WARDEN,

Petitioner,

v.

CHAMAR AVERY,

Respondent.

In Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

QUESTION PRESENTED.....i

TABLE OF AUTHORITIES.....ii

COUNTERSTATEMENT OF THE CASE.....1

INTRODUCTION.....2

ARGUMENT:

I. and III. THE SIXTH CIRCUIT DID NOT CREATE ANY "NEW RULE" INCONSISTENT WITH STRICKLAND; THE SIXTH CIRCUIT FOLLOWED THE RULE OF STRICKLAND AND THEREFORE THE RULE FOLLOWED BY THE SIXTH CIRCUIT WAS DERIVED FROM CLEARLY ESTABLISHED UNITED STATES SUPREME COURT PRECEDENT AS REQUIRED BY 28 USC 2254(D)....2

II. THE SIXTH CIRCUIT'S DECISION, BASED ON A PROPER APPLICATION OF *STRICKLAND*, DOES NOT CONFLICT WITH OTHER FEDERAL CIRCUIT COURTS.....8

CONCLUSION.....13

QUESTION PRESENTED

WHETHER THE UNITED STATES COURT OF APPEALS FOR SIXTH CIRCUIT CORRECTLY CITED AND APPLIED FEDERAL LAW AS DETERMINED BY THIS COURT, CORRECTLY APPLIED THE "PREJUDICE" PRONG OF *STRICKLAND V WASHINGTON*, AND DID NOT STATE A NEW STANDARD OF REVIEW.

TABLE OF AUTHORITIES

CASES

Freeman v. Graves, 317 F.3d 898 (8th Cir. 2003).....10

Griffin v. Warden, Maryland Correctional Adjustment Center, 970 F.2d 1355 (4th Cir.1992).....9, 12

Knowles v. Mirzayance, 129 S.Ct. 1411; 173 L.Ed.2d 251 (2009).....4, 5

Newman v. Metrish, 543 F.3d 793 (6th Cir. 2008).....12

Raygoza v. Hulick, 474 F.3d 958 (7th Cir. 2007), cert denied, 128 S.Ct. 613; 169 L.Ed.2d 413 (2007).....10; 11

Smith v. Berghuis, 543 F.3d 326 (6th Cir. 2008).....12; 13

Strickland v. Washington, 466 U.S. 668 (1984).....2, 3, 4, 5, 6, 7, 9, 10; 11, 14

Thompkins v. Berghuis, 547 F.3d 572 (6th Cir. 2008).....12

United States v. Cronic, 466 U.S. 648 (1984).....3, 4, 10

United States v. Olson, 846 F.2d 1103 (4th Cir. 1988).....9

Washington v. Smith, 219 F.3d 620 (7th Cir. 2000).....11

COUNTERSTATEMENT OF THE CASE

The Sixth Circuit Court of Appeals applied the relevant United States Supreme Court precedent, as set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and found that Respondent Avery was denied his right to effective assistance of counsel at trial. *Avery v. Prelesnik*, 548 F.3d 434 (6th Cir. 2008) (rehearing and rehearing *en banc* denied with no votes, 2-9-09). (At a post conviction hearing, it was revealed that trial counsel had failed to investigate or interview two potential alibi witnesses.[1]) Petitioner does not dispute this finding, nor does Petitioner dispute the Sixth Circuit's conclusion that the Michigan Court of Appeals unreasonably applied *Strickland* in finding no ineffective assistance of counsel. Respondent takes issue only with the Sixth Circuit's finding with regard to the prejudice prong of the *Strickland* test, and claims that a trial judge's finding with regard to an alibi witness's credibility is unreviewable and binding on the federal Circuit Court.

Contrary to Petitioner's claims, the Sixth Circuit in this case did not find that a trial court is not allowed to evaluate witness credibility in determining whether the accused was prejudiced by counsel's errors. Like the Fourth and Eighth Circuits, the Sixth Circuit in the instant case recognized that a trial court's determination of the credibility of a purported alibi witness is part of the prejudice analysis.[2] However, the Sixth Circuit went on to find that the trial court failed to seriously engage in a complete *Strickland* prejudice analysis, which requires a court to consider the totality of the evidence before the judge or jury. *Strickland* at 695. Therefore, Respondent's only real complaint is with the result. Because the result is solidly grounded in well-established federal law as determined by this Court, there is no basis for granting Petitioner's writ.

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[1] Damar Crimes and Darius Boyd testified at the hearing and were consistent in their testimony that Chamar Avery was with them, at Crimes Towing and at the home of Darius Boyd, between 6:00 p.m. and 9:30 p.m.; the crime occurred between 7:30 p.m. and 8:00 p.m.

[2] "We do not denigrate the role of the factfinder in judging credibility…" *Avery* at 439.

INTRODUCTION

The Petition should be denied because the Sixth Circuit meticulously followed *Strickland v. Washington*, 466 U.S. 668 (1984), it did not create any "new rule," the decision does not present a conflict with any other federal circuit, the case is fact-specific and does not involve any important constitutional question in controversy, and the decision is not erroneous.

ARGUMENT

I. and III.

THE SIXTH CIRCUIT DID NOT CREATE ANY "NEW RULE" INCONSISTENT WITH *STRICKLAND*; THE SIXTH CIRCUIT FOLLOWED THE RULE OF *STRICKLAND* AND THEREFORE THE RULE FOLLOWED BY THE SIXTH CIRCUIT WAS DERIVED FROM CLEARLY ESTABLISHED UNITED STATES SUPREME COURT PRECEDENT AS REQUIRED BY 28 USC 2254(D).

Petitioner does not challenge the finding of the district court or the Sixth Circuit Court of Appeals that Respondent Avery was denied his constitutional right to effective assistance of counsel. Petitioner only alleges, regarding the prejudice prong, that the Sixth Circuit Court of Appeals created a "new rule" that "prejudice is presumed" every time a defendant has an alibi witness, "no matter how bizarre or unbelievable," who was not called at trial. The Sixth Circuit did no such thing. The Court cited and applied the two-part analysis established by this Court in *Strickland v. Washington* 466 U.S. 668 (1984), and found, correctly, that trial counsel was ineffective and that Respondent was prejudiced. The Sixth Circuit did not, as Petitioner argues, use the standard of *United States v. Cronic* 466 U.S. 648 (1984) (the Court never even mentioned *Cronic*) or any manufactured standard. The Sixth Circuit reviewed and considered

the trial judge's findings and the findings of the Court of Appeals with regard to ineffective assistance and prejudice, and determined that the state courts *unreasonably*, not merely incorrectly, applied United States Supreme Court precedent. Specifically, the Court stated:

> "Under the Antiterrorism and Effective Death Penalty Act of 1996, a district court shall not grant a habeas petition with respect to any claim that was adjudicated on the merits in the state courts unless the adjudication resulted in a decision that: (1) was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court; or (2) was based on an unreasonable determination of the facts in light of the evidence presented to the state courts. 28 U.S.C. § 2254(d).
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> * * *
>
> "[T]he habeas petitioner has the burden of rebutting, by clear and convincing evidence, the presumption that the state court's factual findings were correct.
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> * * *
>
> "Claims of ineffective assistance of counsel have two parts: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (citing *Strickland v. Washington*, 466 U.S. 668, 687(1984)). The Supreme Court assesses performance using an objective standard of reasonableness and prevailing professional norms. *Strickland*, 466 U.S. at 688. Prejudice occurs when there is a reasonable probability that, but for counsels unprofessional errors, the result of the proceeding would have been different. *Id.* at 694." *Avery v. Prelesnik*, *supra* at 436-437 (Petition, pp. 4a-5a).

In rejecting the trial judge's "finding" with regard to prejudice,[3] the Sixth Circuit determined that, primarily because the trial court found (before hearing the alibi witnesses testify) that counsel was not ineffective, it did not make any serious, reasoned analysis

[3] Contrary to Petitioner's allegation, the trial judge did not find *both* witnesses "totally incredible." (See fn. 6). The judge pointed out the inconsistency between Crimes' and Avery's recollection of the precise time that Avery brought his car in for repairs, but never said Crimes was incredible. And this inconsistency did not involve the alibi (the whereabouts of Avery at the time of the shooting).

concerning prejudice[4] - which, again, the Sixth Circuit recognized as the second prong of *Strickland*:

> "To satisfy *Strickland's* prejudice prong, Avery must demonstrate that with effective assistance of counsel, the result of his trial would have been different with a probability sufficient to undermine the confidence in the outcome. 466 U.S. at 694. He must show a reasonable probability that absent his trial attorney's errors, the factfinder would have had a reasonable doubt respecting guilt. *Id.* at 695.[5]
>
> * * *
>
> "Though the judge presiding over the hearing observed, 'I can't say that this would have resulted in a different result at all,' **we do not find in the record evidence that the trial court seriously engaged in a complete *Strickland* prejudice analysis, which requires a court to consider the totality of the evidence before the judge or jury**. (Emphasis added).
>
> * * *
>
> "Here, although the factors the state judge highlighted in her credibility assessment - including Boyd's ability to remember exact times while failing to recall the date or day of the week that Avery visited his home - may have ultimately affected the credibility of his testimony in the eyes of the jury, **but they do not dispose of the issue of prejudice**. Notably, the evidentiary hearing occurred approximately a year and three months after Avery's trial, and **the record before us does not demonstrate that the presiding judge found fault with Crimes's testimony.** (Emphasis added).
>
> * * *
>
> Moreover, *Strickland* instructs that a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. *Id.* Thus, the availability of willing alibi witnesses must also be considered in light

[4] The Sixth Circuit opinion also reveals that the trial judge's subjective "finding" was not based on a reasonable assessment of the facts (the testimony of the alibi witnesses was not inconsistent in any *significant* way).

[5] In rejecting the outcome-determinative standard and adopting the current standard, the *Strickland* Court stated, "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694.

> of the otherwise flimsy evidence supporting Avery's conviction. *See Strickland*, 466 U.S. at 696." *Avery v. Prelesnik, supra* at 438- 439 (Petition, pp. 8a-9a).

Although the Court correctly stated that witness credibility *on the issue of guilt or innocence* is a matter for the jury,[5] the Sixth Circuit did *not* hold that the state trial court "cannot consider the credibility of an alibi witness in determining whether trial counsel was ineffective." (Petition, p. 21). The Sixth Circuit merely found that the trial court failed to properly analyze the essential issue of prejudice by failing to consider the totality of the evidence (therefore its decision was unreasonable)[7], that the Michigan Court of Appeals did not address the issue at all, and that Respondent was prejudiced by trial counsel's ineffectiveness.

In making the latter finding, the Sixth Circuit again applied the correct United States Supreme Court precedent. The Court found:

> To satisfy *Strickland's* prejudice prong, Avery must demonstrate that with effective assistance of counsel, the result of his trial would have been different with a probability sufficient to undermine the confidence in the outcome. 466 U.S. at 694. He must show a reasonable probability that absent his trial attorneys' errors, the factfinder would have had a reasonable doubt respecting guilt. *Id* at 695.
>
> * * *
>
> In sum, we agree with the district court's conclusion that potential alibi witnesses coupled with an otherwise weak case renders the failure to investigate the testimony sufficient to undermine confidence in the outcome of the jury verdict. We do not ask whether Avery was ultimately innocent, but, rather, whether he was deprived a reasonable shot of acquittal. Here, the jury was deprived of the

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[5] A proper consideration when determining the reasonable likelihood of a different result: a "reasonable probability" does not mean a certainty, or even a preponderant likelihood, of a different outcome, nor that no rational juror could constitutionally find the defendant guilty. *Strickland v. Washington at 694*

[7] *The Sixth Circuit correctly recognized that the credibility of one out of three alibi witnesses (Damar Crimes*, Darius Boyd, and Chamar Avery) was not the *sole* factor in determining prejudice. And the trial court's determination of credibility, while relevant, is not *binding* on the reviewing court.

> right to hear testimony that could have supplied such reasonable doubt.
>
> Because the Michigan Court of Appeals's application of *Strickland* standard was unreasonable, we AFFIRM the district court's grant of Avery's petition for a writ of habeas corpus." *Avery v. Prelesnik*, *supra* at 438-439 (Petition, pp. 8a-10a).

The observation that Respondent never got a "reasonable shot of acquittal" was not the statement of a "new rule." It was an observation. The Sixth Circuit Court of Appeals followed *Strickland* to the letter in finding that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different sufficient to undermine confidence in the outcome.

The decision by the Sixth Circuit does not contradict this Court's application of *Strickland* in *Knowles v. Mirzayance*, 129 S.Ct. 1411, 173 L.Ed.2d 251 (2009), in any way. In applying *Strickland* and reversing the Ninth Circuit Court of Appeals' holding that trial counsel was ineffective, this Court in *Mirzayance* found that abandoning the insanity plea was reasonable trial strategy. Petitioner in the instant case does not dispute the finding that trial counsel was ineffective. The *Strickland* prejudice test was applied in *Mirzayance*, just as it was in this case by the Sixth Circuit. However, the Court in *Mirzayance* concluded that it was highly improbable that the jury would accept a defense *it had just rejected*. In the instant case, the Sixth Circuit followed the *Strickland* test in finding that Respondent demonstrated a reasonable probability that the result would have been different. The Sixth Circuit did not apply a different test than this Court applied in *Mirzayance*. Again, there was no "new rule." The different *results* do not demonstrate a conflict in the *law* that was applied.

In fact, it is the Petitioner who is advocating a new rule: that a trial court's subjective finding on witness credibility is *unreviewable*. Petitioner argues that it follows from the trial

judge's subjective opinion (that one of Respondent's alibi witnesses was "completely incredible"[8]) that "Avery *could not have* suffered prejudice from trial counsel's failure to call the 'alibi' witnesses, because no reasonable juror could believe their manufactured story." (Petition, p. 8, emphasis added). Petitioner is seeking a "new rule" that the trial judge's opinion on witness credibility, however unsupported, is, without more, a finding of "no prejudice" that is infallible and cannot be reviewed by the state appellate courts, the federal appellate courts, or this Court. This position, of course, is wholly inconsistent with clearly established federal law. (Neither the performance nor the prejudice components of the ineffectiveness inquiry in a state court are findings of fact binding on the federal court. *Strickland, supra*, at 698.)

It should be noted that the trial judge who heard the post-conviction hearing was not the judge who heard the trial, and that she tried to circumvent the Michigan Court of Appeals' order to conduct an evidentiary hearing. She informed counsel that she had no obligation to conduct a hearing, she found that trial counsel provided effective assistance without hearing the alibi witnesses' testimony, and indicated that this determination would not be affected by the witnesses who she reluctantly allowed to make a record. The judge said:

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[8] The trial judge never actually said that Mr. Boyd was "completely incredible," only that it was "totally incredible" that he could remember the events of the day but not the exact date, and the trial judge had no support or theory for why his testimony might be "manufactured." The judge said:

> "I understand that argument [that the date would be inferred from the fact that Mr. Avery only went to Darius Boyd's house one time with Damar Crimes], but again as the fact finder, I have to wonder just how much he remembers, if he can remember the times, the exact times of the occurrences on two different time frames when he can't even remember the day and initially didn't even remember the season until he was basically prompted, until I stepped in. So I find that to be totally incredible and what it suggests to me is a manufacturing of testimony." (Hearing of 11-2-09, p. 60).

Actually, contrary to the judge's finding, the witness *did* remember the season: he testified (with no help from the judge) that the event occurred in the winter of 2000, about two weeks after the New Year. *Id.*, 7, 10.

> And let me just make my position clear. My position is that there hasn't been the foundational requirement established to even have this hearing. That's my position and I'll make that very clear in my ruling because my position further is that the Court of Appeals did not order me, as I indicated to you this morning, to have an Evidentiary Hearing. **I'm going to have one just for the sake of judicial economy. That's the only reason.** I don't think this is legally supportable at all, frankly, because of the threshold requirement [ineffective assistance of counsel] that must be met which hasn't been met in my opinion . . .I have told you that I'm going to allow you to present witnesses on a motion that I think is frivolous. I mean, frankly, I think it's a waist [sic] of my time, my staff's and everyone's time..." (Hearing, 6-7-2001, pp. 58, 63).

A reading of the witnesses' testimony will reveal that they were consistent on all significant facts, and the judge's conclusion that one of the witnesses was "completely incredible" (because he could not remember an exact date) was completely unsupported. Her personal finding that counsel would have been ineffective if he presented the alibi was based on a blatant, racist and ageist stereotype that a young black man would not have the money to pay for his car repairs without robbing someone. (Hearing of 9-7-2001, p. 53; Hearing of 11-2-2001, p.49, 50, 57, 58). As the Court said in *Griffin v. Warden, Maryland Correctional Adjustment Center*, 970 F.2d 1355 (4th Cir.1992), "Tolerance of tactical miscalculations is one thing; fabrication of tactical excuses is quite another. *Kimmelman v. Morrison*, 477 U.S. 365, 386-387, 106 S.Ct. 2574, 2588-2589, 91 L.Ed.2d 305 (1986)."

II. THE SIXTH CIRCUIT'S DECISION, BASED ON A PROPER APPLICATION OF *STRICKLAND*, DOES NOT CONFLICT WITH OTHER FEDERAL CIRCUIT COURTS.

The premise upon which Petitioner bases his "conflict" argument is false. The Sixth Circuit in this case did *not* create a new rule (as demonstrated in Respondent's Issue I and III.) The decisions of the Fourth and Eighth Circuits cited by Petitioner are not inconsistent because

those circuits, like the Sixth Circuit, followed the two-prong prejudice test of *Strickland* v *Washington, supra*. In *United States* v *Olson*, 846 F2d 1103 (4th Cir. 1988), the Fourth Circuit, like the Sixth Circuit here, reviewed the record, but determined that the defendant had failed to establish that had the alibi defense been presented there was a reasonable probability that the result of the proceeding would have been different. That the Sixth Circuit here came to the opposite conclusion, using the same *Strickland* standard, does not create a conflict.

Similarly, the Eleventh Circuit applied *Strickland* in *Bottoson* v. *Moore*, 234 F.3d (11th Cir. 2000). The Eleventh Circuit acknowledged that a finding of fact made by a trial judge is presumed to be correct. The Sixth Circuit acknowledged this also in the instant case:

> "Finally, the habeas petitioner has the burden of rebutting, by clear and convincing evidence, the presumption that the state court's factual findings were correct. 28 U.S.C. § 2254(e)(1); *McAdoo* v. *Elo*, 365 F.3d 487, 493-94 (6th Cir. 2004)." *Avery* v *Prelesnik*, *supra* at 437 (Petition, p. 5a).

The trial judge's statement in the instant case, that witness Boyd's inability to remember the date while remembering other details was "completely incredible," is merely an unsupported, subjective opinion by a judge who did not preside at trial and who had pre-determined that counsel was not ineffective. Even so, the Sixth Circuit took this finding into consideration. However, as the Court of Appeals concluded, the trial court failed to seriously engage in a complete *Strickland* prejudice analysis, which requires a court to consider the totality of the evidence. The Sixth Circuit followed *Strickland* and, although it concluded that Respondent was prejudiced and the Michigan courts unreasonably applied *Strickland*, that conclusion does not create a conflict.

The third case cited by Petitioner, *Freeman* v *Graves*, 317 F.3d 898 (8th Cir. 2003), is inapposite. The district court in that case used the *Cronic* standard in reviewing an ineffective

assistance of counsel claim, and the Eighth Circuit reversed, holding that the proper standard was set forth in *Strickland*. It is unclear why Petitioner cites *Freeman* because the Sixth Circuit in the instant case properly applied the *Strickland* two-pronged analysis (see Issue I and III) and did not even mention *Cronic*.

The analysis and findings of the Sixth Circuit in the instant case are completely consistent with other Circuit Courts. For example, the Seventh Circuit Court of Appeals granted a petition for writ of habeas corpus in a case very similar to the one at bar. In *Raygoza v. Hulick*, 474 F.3d 958 (7th Cir. 2007), cert denied, 128 S.Ct. 613, 169 L.Ed.2d 413 (2007), the petitioner had argued in state court that trial counsel was ineffective in failing to investigate alibi witnesses before trial, and the witnesses testified at a post-conviction hearing. The prosecutor presented evidence that the alibi testimony may have been "scripted." The state court[9] denied the motion for new trial and the state appellate courts affirmed. The federal district court denied the petition for writ of habeas corpus. The Seventh Circuit found that trial counsel was ineffective for failing to present the alibi, and further found prejudice, despite the state trial court's finding that the result of the proceeding would not have been different:

> "Raygoza is not entitled to relief, however, unless he also can establish that he was prejudiced by his attorney's deficient performance. . . . We find this test [*Strickland's* prejudice test] met as well, *even taking into account both the AEDPA standard of review and the fact that the trial judge subjectively believed that the array of additional alibi witnesses would not have swayed his judgment.*" *Id.* at 965.

The Seventh Circuit recognized that the trial judge's subjective opinion concerning the credibility and/or persuasiveness of the witnesses' testimony was not the *sole* factor in making the requisite prejudice finding.

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[9] Like the judge in the instant case, in *Raygoza* "The trial judge held a hearing on the motion, but even before the hearing began he expressed skepticism about the value of the proceeding."

> "The State's case against Raygoza was not particularly strong. The only evidence apart from the suppressed confession linking him to the crime was eyewitness identification from rival gang members . . .. and a passerby . . . On the other side, Raygoza's alibi witnesses included both family members and unrelated people; their stories were corroborated by telephone records and train tickets. Obviously, a trier of fact approaching the case with fresh eyes might choose to believe the eyewitnesses and to reject the alibi evidence, but this trier of fact never had the chance to do so. *This undermines our confidence in the outcome of the proceedings so seriously that we conclude that there is a reasonable probability that the result would have been different* had Raygoza's attorney presented the testimony of all or most of his alibi witnesses." *Id.*

The Sixth Circuit's application of *Strickland* in the case at bar does not conflict with that of the Seventh Circuit, or any other circuit. Moreover, *Raygoza* demonstrates that the government's position in the instant case - that a state trial judge's determination of witness credibility is unreviewable - is contrary to the prejudice standard required by *Strickland*. The trial court's subjective opinion of witness credibility is only one factor in the prejudice analysis, which is fully reviewable. *See also Washington v. Smith*, 219 F.3d 620 (7th Cir. 2000), where the Seventh Circuit Court of Appeals rejected the state court's finding that the petitioner was not prejudiced by his attorney's alleged ineffectiveness because, if the missing defense witness had testified, the State would have put another witness on the stand to contradict the defense witness's testimony and because the other defense witnesses would have been cumulative. Under the Petitioner's Prelesnik's "new rule" in the instant case, the state court findings in *Smith* would have been unreviewable.

The analysis in the instant case is also very similar to that of the Fourth Circuit in *Griffin v. Warden, Maryland Correctional Adjustment Center*, *supra*. There, the state court found that trial counsel's failure to present alibi witnesses at trial, where the petitioner was identified by an eyewitness, was not ineffective and that the petitioner failed to demonstrate prejudice. As in the

instant case, the Fourth Circuit faulted the state court for its failure to adequately assess prejudice, and granted the petition for writ of habeas corpus. The Court found that the petitioner had shown prejudice, stating, "Eyewitness identification evidence, uncorroborated by a fingerprint, gun, confession, or coconspirator testimony, is a thin thread to shackle a man for forty years. Moreover, it is precisely the sort of evidence that an alibi defense refutes best." *Id.* at 1359.

Suffice it to say that there is *no conflict* between the decision in the instant case and those of other federal circuits regarding the standard to apply when reviewing a claim of ineffective assistance of counsel and prejudice to the defendant. That the results of the various cases are different is only a function of the specific facts of each case. It appears that Petitioner is merely dissatisfied with the result in this case.

Finally, there is absolutely no connection between the decision in the present case and the other Sixth Circuit opinions referred to by Petitioner. *Thompkins v. Berghuis*, 547 F.3d 572 (6th Cir. 2008) involves a violation of *Miranda*; *Newman v. Metrish*, 543 F.3d 793 (6th Cir. 2008), involves an insufficiency of evidence issue; *Smith v. Berghuis*, 543 F.3d 326 (6th Cir. 2008), involves a jury selection (fair cross section) issue for an automated selection process that is no longer employed by the trial court in that county.

The Sixth Circuit correctly applied Supreme Court precedent and there are no grounds for granting the Petition.

CONCLUSION

The Sixth Circuit's opinion is completely compatible with the principles set forth in *Strickland v Washington, supra*; the Sixth Circuit did not create a new rule but followed the rule of *Strickland*; the Sixth Circuit's opinion is not in conflict with decisions of the Fourth, Eighth, or Eleventh Circuits; the Sixth Circuit followed the clearly established Supreme Court precedent of *Strickland v Washington*.

This Court should deny the petition for writ of certiorari.

Respectfully submitted,

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Dated: July 2, 2009

NO. 08-1389

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JOHN PRELESNIK, WARDEN

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v.

CHAMAR AVERY,

Respondent.

PROOF OF SERVICE

STATE OF MICHIGAN)
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and she mailed one copy of same to:

Attorney General
Criminal Appellate Division
525 West Ottawa
P O Box 30217
Lansing, MI 48909

Jacqueline Ouvry
Jacqueline Ouvry

Subscribed and sworn to before me
July 2, 2009.
Joanne M. Moritz
Joanne M. Moritz
Notary Public, Wayne County, Michigan
My commission expires: 9-2-2012

JOANNE M. MORITZ
NOTARY PUBLIC, STATE OF MICHIGAN
COUNTY OF WAYNE
MY COMMISSION EXPIRES Sep 2, 2012
ACTING IN COUNTY OF WAYNE

Supreme Court, U.S.
FILED
AUG 11 2009
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No. 08-1389

In the Supreme Court of the United States

John Prelesnik,
Petitioner,

v.

Chamar Avery,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PETITIONER'S REPLY BRIEF 1

I. The State court's finding of fact that the proposed alibi witnesses were not credible is presumed to be correct under AEDPA. Respondent failed to overcome that presumption 2

II. The Sixth Circuit did not overcome the presumption of correctness by clear and convincing evidence. Instead, it ignored that factual finding. 4

TABLE OF AUTHORITIES

Page

Cases

Amadeo v. Zant,
486 U.S. 214 (1988) 1

Avery v. Prelesnik,
548 F.3d 434 (6th Cir. 2008) 6

Blackledge v. Allison,
431 U.S. 63 (1977) 2

Shabazz v. Artuz,
336 F.3d 154 (2d Cir. 2003) 1

Smith v. McCormick,
914 F.2d 1153 (9th Cir. 1990) 2, 4

Smith v. Spisak,
case no 08-724, cert granted Feb. 23, 2009 ..... 1, 7

Strickland v. Washington,
466 U.S. 668 (1984) 1, 6, 7

United States v Cronic,
466 U.S. 648 (1984) 7

Woodford v. Visciotti,
537 U.S. 19, 123 S. Ct. 357, 154 L. Ed. 2d 279
(2002) (per curiam) 2

Statutes

28 U.S.C. § 2254(e)(1) 1, 3

28 U.S.C. § 2254(e)(2) 4

Other Authorities

Antiterrorism and Effective Death Penalty Act of 1996 ..... passim

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It is axiomatic that a federal appellate court must give "due regard . . . to the opportunity of the trial court to judge the credibility of the witnesses."[2] This "due regard" is strengthened on habeas review because of the "double layer" of deference given to State court determinations of credibility. First, under the general *Strickland* layer, a State prisoner must establish a *prejudicial* error – i.e., an error so serious that it calls into question the reliability of the entire trial.[3] Second, under AEDPA, a federal appellate court must presume that factual determinations are correct, especially those regarding witness credibility.[4]

The presumption of factual correctness can only be overcome if they are proven to be incorrect by clear and convincing evidence.[5] This Court has held that where, as

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here, the central issue is one of credibility, an evidentiary hearing will often be necessary to resolve material factual conflicts.[6] In other words, an evidentiary hearing is generally necessary to provide the "clear and convincing evidence" required for a federal habeas court to reject the factual finding of a State trial court.

But in this case, the Sixth Circuit did not order an evidentiary hearing to determine whether the "alibi" witnesses cited by Respondent were as incredible as the State trial court who observed their testimony found them to be. Nor did the Sixth Circuit find that this was one of the "rare instances" where credibility might be determined without an evidentiary hearing, "based on documentary testimony and evidence on the record."[7] Instead, the Sixth Circuit *ignored* the finding of fact by the State trial court and it held that as a matter of law, the failure to pursue any alibi defense is per se unreasonable because it deprives Respondent of a "reasonable shot of acquittal."

I. The State court's finding of fact that the proposed alibi witnesses were not credible is presumed to be correct under AEDPA. Respondent failed to overcome that presumption.

Under the highly deferential AEDPA standard, a federal habeas court must give the State-court decision "the benefit of the doubt."[8] That "benefit of the doubt"

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lasts until the habeas petitioner demonstrates that such findings are incorrect by clear and convincing evidence.[9]

Respondent argues that the finding by the State trial court that the alibi witnesses lacked credibility was completely unsupported. But Respondent, like the Sixth Circuit, failed to give the State trial court the deference that is required under AEPDA.

Here, the trial court found as a matter of fact that neither of the alibi witnesses proposed by Respondent was credible. Since their testimony could not be believed, trial counsel was not ineffective for failing to call them. Specifically, the trial court noted that purported alibi witness Damar Crimes's statement was inconsistent with Avery's testimony on a fundamental point. Pet. App. 41a. Damar Crimes testified that Avery dropped off his automobile at the repair shop on the day of the murder, while Avery claimed to have dropped the automobile off on the day before the murder. Pet. App. 40a - 41a. The trial court concluded that witness Darius Boyd – who was allegedly with Avery and Damar Crimes – was completely incredible. Specifically, the court noted that his testimony "suggests to me a manufacturing of testimony." Pet. App. 46 a.

Implicit in the State trial court's conclusion is that Avery could not have suffered prejudice from trial counsel's failure to call the "alibi" witnesses, because no reasonable juror could believe their manufactured story. In other words, the failure to call wholly non-credible witnesses cannot deprive a defendant of a fair trial because their false testimony could not with any reasonable probability have changed the outcome.

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[9] 28 U.S.C. § 2254(e)(1).

Under AEDPA, then, the federal habeas court was bound to presume that these credibility determinations were correct.

II. The Sixth Circuit did not overcome the presumption of correctness by clear and convincing evidence. Instead, it ignored that factual finding.

Respondent argues that the Petitioner is asking this Court to create a new rule making a trial court's subjective finding on witness credibility unreviewable. While that is not correct, it nevertheless highlights the idea that Congress intended habeas review of State court convictions to be a *limited* remedy. Under 28 U.S.C. § 2254(e)(2), Congress set forth very limited conditions under which a federal habeas court can proceed with an evidentiary hearing in order to make its own findings of fact. Unless those conditions are met, a habeas petitioner is *not* entitled to hearing and the findings of fact made at the State court level *must* be given deference.

Where no evidentiary hearing is authorized, the federal habeas court in rare circumstances might still review a State court determination of credibility where it is possible to conclusively decide the credibility question "based on documentary testimony and evidence on the record."[10] But the federal habeas court must have *some* basis upon which it decides there is "clear and convincing evidence" to overcome the presumption that the State trial court was correct. In the absence of either a circumstance justifying an evidentiary hearing or of "evidence on the record" disputing the State trial court's finding of fact, then a claim regarding those facts is

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[10] *McCormick*, 914 F.2d at 1170.

essentially unreviewable. That is what Congress intended when it limited the scope of habeas review under AEDPA.

Yet, the Sixth Circuit did not order an evidentiary hearing to challenge the State trial court's finding that the alibi witnesses were incredible. Nor did the Sixth Circuit undertake an analysis of the "evidence on the record" to demonstrate why the State trial court's determination of credibility was incorrect. Rather, the Sixth Circuit simply rejected the trial court's factual determination and substituted its own determination of the facts:

> We do not denigrate the role of the factfinder in judging credibility when we review a record in hindsight, but evaluation of the credibility of alibi witnesses is "exactly the task to be performed by a rational jury[,]" not by a reviewing court. Here, although the factors the state judge highlighted in her credibility assessment -- including Boyd's ability to remember exact times while failing to recall the date or day of the week that Avery visited his home -- may have ultimately affected the credibility of his testimony in the eyes of the jury, but they do not dispose of the issue of prejudice. Notably, the evidentiary hearing occurred approximately a year and three months after Avery's trial, and the record before us does not demonstrate that the presiding judge found fault with Crimes's testimony. Ultimately, as the district court properly recognized, "[O]ur Constitution leaves it to the jury, not the judge, to evaluate the

> credibility of witnesses in deciding a criminal defendant's guilt or innocence."[11]

This was the new rule created by the Sixth Circuit in this case – a rule that would deprive a State trial court from determining whether a proposed alibi witness was so incredible that his or her testimony could not have altered the outcome of the trial.[12]

According to this novel rule, any determination of a witnesses's credibility is *always* within the providence of the jury. Therefore, the failure to call a witness is *always* prejudicial, because it deprives a defendant of a "reasonable shot of acquittal."

However, this is the exact opposite of what *Strickland* requires. Under *Strickland*, a habeas petitioner carries the burden of proof to demonstrate that there is a "reasonable probability" that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." [13] But that was not the holding of the Sixth Circuit in this case. Rather, the Sixth Circuit identified the "error" as failing to investigate two incredible witnesses; and it defined the "harm" caused by that error as depriving Respondent of a "reasonable shot of acquittal."[14]

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[11] *Avery v. Prelesnik*, 548 F.3d 434, 439 (6th Cir. 2008).

[12] Respondent's contention that the African-American State court judge in this case made her determination "based on a blatant, racist and ageist stereotype that a young black man would not have the money to pay for his car repairs without robbing someone" is hyperbole and unsupported by *any* evidence whatsoever.

[13] *Strickland*, 466 U.S. at 698.

[14] *Avery*, 548 F.3d at 439.

But this case is not an isolated instance of the Sixth Circuit deciding an important question of federal law in a way that conflicts with decisions of this Court.[15] Indeed, this case is not even the only instance where the Sixth Circuit has imposed a *Cronic* standard on habeas review without citing to *United States v. Cronic*.[16]

This Court recently granted certiorari to the Sixth Circuit in *Smith v. Spisak*, and identified one of the issues for briefing as whether "the Sixth Circuit exceeded its authority under AEDPA when it applied *United States v. Cronic* [], to presume that a habeas petitioner suffered prejudice from several allegedly deficient statements"). In *Smith*, the Sixth Circuit undertook its analysis by noting that trial counsel was ineffective based on his arguments at closing. But the Sixth Circuit determined that the comments were the functional equivalent of counsel not being present at all and, on the basis, found that the defendant was *per se* prejudiced by those arguments. Just as in the instant case, the Sixth Circuit cited *Strickland* and purported to apply that case. Moreover, like the instant case, the Sixth Circuit did not even cite *Cronic* in its analysis. But the Sixth Circuit's decision not to cite *Cronic* is not dispositive – in both cases the Sixth Circuit held that trial counsel's failures were *per se* prejudicial and granted habeas relief on that basis.

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[15] The State of Michigan notes that it has filed three other petitions for certiorari contemporaneously with this petition. See *Berghuis v. Thompkins*, (08-1470); *Metrish v. Newman*, (08-1401); and *Berghuis v. Smith*, (08-1402). All four are murder cases, all published, all reaching disposition in February 2009, in which the State of Michigan contends the Sixth Circuit failed to accord the State court decisions with the proper level of deference required by AEDPA.

[16] *United States v Cronic*, 466 U.S. 648, 659 (1984).

Here, the Sixth Circuit did not demonstrate that, but for trial counsel's deficient performance, there was a "reasonable probability" that the outcome of the trial would have been different. Rather, the Sixth Circuit merely opined that the alibi witnesses "could have" supplied reasonable doubt and the failure to call them deprived Respondent of a "reasonable shot at acquittal." In other words, the Sixth Circuit articulated a *Cronic* standard for the failure to call an alibi witness; even though the Sixth Circuit did not cite *Cronic*.

Respectfully submitted

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Dated: August, 2009

assistance of counsel claim, and the Eighth Circuit reversed, holding that the proper standard was set forth in *Strickland*. It is unclear why Petitioner cites *Freeman* because the Sixth Circuit in the instant case properly applied the *Strickland* two-pronged analysis (see Issue I and III) and did not even mention *Cronic*.

The analysis and findings of the Sixth Circuit in the instant case are completely consistent with other Circuit Courts. For example, the Seventh Circuit Court of Appeals granted a petition for writ of habeas corpus in a case very similar to the one at bar. In *Raygoza v. Hulick*, 474 F.3d 958 (7th Cir. 2007), cert denied, 128 S.Ct. 613, 169 L.Ed.2d 415 (2007), the petitioner had argued in state court that trial counsel was ineffective in failing to investigate alibi witnesses before trial, and the witnesses testified at a post-conviction hearing. The prosecutor presented evidence that the alibi testimony may have been "scripted." The state court[9] denied the motion for new trial and the state appellate courts affirmed. The federal district court denied the petition for writ of habeas corpus. The Seventh Circuit found that trial counsel was ineffective for failing to present the alibi, and further found prejudice, despite the state trial court's finding that the result of the proceeding would not have been different:

> "Raygoza is not entitled to relief, however, unless he also can establish that he was prejudiced by his attorney's deficient performance. . . . We find this test [*Strickland's* prejudice test] met as well, *even taking into account both the AEDPA standard of review and the fact that the trial judge subjectively believed that the array of additional alibi witnesses would not have swayed his judgment.*" *Id.* at 965.

The Seventh Circuit recognized that the trial judge's subjective opinion concerning the credibility and/or persuasiveness of the witnesses' testimony was not the *sole* factor in making the requisite prejudice finding.

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[9] Like the judge in the instant case, in *Raygoza* "The trial judge held a hearing on the motion, but even before the hearing began he expressed skepticism about the value of the proceeding."

> "The State's case against Raygoza was not particularly strong. The only evidence apart from the suppressed confession linking him to the crime was eyewitness identification from rival gang members . . .. and a passerby . . . On the other side, Raygoza's alibi witnesses included both family members and unrelated people; their stories were corroborated by telephone records and train tickets. Obviously, a trier of fact approaching the case with fresh eyes might choose to believe the eyewitnesses and to reject the alibi evidence, but this trier of fact never had the chance to do so. *This undermines our confidence in the outcome of the proceedings so seriously that we conclude that there is a reasonable probability that the result would have been different* had Raygoza's attorney presented the testimony of all or most of his alibi witnesses." *Id.*

The Sixth Circuit's application of *Strickland* in the case at bar does not conflict with that of the Seventh Circuit, or any other circuit. Moreover, *Raygoza* demonstrates that the government's position in the instant case - that a state trial judge's determination of witness credibility is unreviewable - is contrary to the prejudice standard required by *Strickland*. The trial court's subjective opinion of witness credibility is only one factor in the prejudice analysis, which is fully reviewable. *See also Washington v. Smith*, 219 F.3d 620 (7th Cir. 2000), where the Seventh Circuit Court of Appeals rejected the state court's finding that the petitioner was not prejudiced by his attorney's alleged ineffectiveness because, if the missing defense witness had testified, the State would have put another witness on the stand to contradict the defense witness's testimony and because the other defense witnesses would have been cumulative. Under the Petitioner's Prelesnik's "new rule" in the instant case, the state court findings in *Smith* would have been unreviewable.

The analysis in the instant case is also very similar to that of the Fourth Circuit in *Griffin v. Warden, Maryland Correctional Adjustment Center*, *supra*. There, the state court found that trial counsel's failure to present alibi witnesses at trial, where the petitioner was identified by an eyewitness, was not ineffective and that the petitioner failed to demonstrate prejudice. As in the

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PETITIONER'S REPLY BRIEF 1

I. The State court's finding of fact that the proposed alibi witnesses were not credible is presumed to be correct under AEDPA. Respondent failed to overcome that presumption 2

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TABLE OF AUTHORITIES

Page

Cases

Amadeo v. Zant,
486 U.S. 214 (1988) 1

Avery v. Prelesnik,
548 F.3d 434 (6th Cir. 2008) 6

Blackledge v. Allison,
431 U.S. 63 (1977) 2

Shabazz v. Artuz,
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Smith v. McCormick,
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Smith v. Spisak,
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I. The State court's finding of fact that the proposed alibi witnesses were not credible is presumed to be correct under AEDPA. Respondent failed to overcome that presumption.

Under the highly deferential AEDPA standard, a federal habeas court must give the State-court decision "the benefit of the doubt."[8] That "benefit of the doubt"

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Respondent argues that the finding by the State trial court that the alibi witnesses lacked credibility was completely unsupported. But Respondent, like the Sixth Circuit, failed to give the State trial court the deference that is required under AEPDA.

Here, the trial court found as a matter of fact that neither of the alibi witnesses proposed by Respondent was credible. Since their testimony could not be believed, trial counsel was not ineffective for failing to call them. Specifically, the trial court noted that purported alibi witness Damar Crimes's statement was inconsistent with Avery's testimony on a fundamental point. Pet. App. 41a. Damar Crimes testified that Avery dropped off his automobile at the repair shop on the day of the murder, while Avery claimed to have dropped the automobile off on the day before the murder. Pet. App. 40a - 41a. The trial court concluded that witness Darius Boyd – who was allegedly with Avery and Damar Crimes – was completely incredible. Specifically, the court noted that his testimony "suggests to me a manufacturing of testimony." Pet. App. 46 a.

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II. The Sixth Circuit did not overcome the presumption of correctness by clear and convincing evidence. Instead, it ignored that factual finding.

Respondent argues that the Petitioner is asking this Court to create a new rule making a trial court's subjective finding on witness credibility unreviewable. While that is not correct, it nevertheless highlights the idea that Congress intended habeas review of State court convictions to be a *limited* remedy. Under 28 U.S.C. § 2254(e)(2), Congress set forth very limited conditions under which a federal habeas court can proceed with an evidentiary hearing in order to make its own findings of fact. Unless those conditions are met, a habeas petitioner is *not* entitled to hearing and the findings of fact made at the State court level *must* be given deference.

Where no evidentiary hearing is authorized, the federal habeas court in rare circumstances might still review a State court determination of credibility where it is possible to conclusively decide the credibility question "based on documentary testimony and evidence on the record."[10] But the federal habeas court must have *some* basis upon which it decides there is "clear and convincing evidence" to overcome the presumption that the State trial court was correct. In the absence of either a circumstance justifying an evidentiary hearing or of "evidence on the record" disputing the State trial court's finding of fact, then a claim regarding those facts is

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[10] *McCormick*, 914 F.2d at 1170.

essentially unreviewable. That is what Congress intended when it limited the scope of habeas review under AEDPA.

Yet, the Sixth Circuit did not order an evidentiary hearing to challenge the State trial court's finding that the alibi witnesses were incredible. Nor did the Sixth Circuit undertake an analysis of the "evidence on the record" to demonstrate why the State trial court's determination of credibility was incorrect. Rather, the Sixth Circuit simply rejected the trial court's factual determination and substituted its own determination of the facts:

> We do not denigrate the role of the factfinder in judging credibility when we review a record in hindsight, but evaluation of the credibility of alibi witnesses is "exactly the task to be performed by a rational jury[,]" not by a reviewing court. Here, although the factors the state judge highlighted in her credibility assessment -- including Boyd's ability to remember exact times while failing to recall the date or day of the week that Avery visited his home -- may have ultimately affected the credibility of his testimony in the eyes of the jury, but they do not dispose of the issue of prejudice. Notably, the evidentiary hearing occurred approximately a year and three months after Avery's trial, and the record before us does not demonstrate that the presiding judge found fault with Crimes's testimony. Ultimately, as the district court properly recognized, "[O]ur Constitution leaves it to the jury, not the judge, to evaluate the

> credibility of witnesses in deciding a criminal defendant's guilt or innocence."[11]

This was the new rule created by the Sixth Circuit in this case – a rule that would deprive a State trial court from determining whether a proposed alibi witness was so incredible that his or her testimony could not have altered the outcome of the trial.[12]

According to this novel rule, any determination of a witnesses's credibility is *always* within the providence of the jury. Therefore, the failure to call a witness is *always* prejudicial, because it deprives a defendant of a "reasonable shot of acquittal."

However, this is the exact opposite of what *Strickland* requires. Under *Strickland*, a habeas petitioner carries the burden of proof to demonstrate that there is a "reasonable probability" that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." [13] But that was not the holding of the Sixth Circuit in this case. Rather, the Sixth Circuit identified the "error" as failing to investigate two incredible witnesses; and it defined the "harm" caused by that error as depriving Respondent of a "reasonable shot of acquittal."[14]

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[11] *Avery v. Prelesnik*, 548 F.3d 434, 439 (6th Cir. 2008).

[12] Respondent's contention that the African-American State court judge in this case made her determination "based on a blatant, racist and ageist stereotype that a young black man would not have the money to pay for his car repairs without robbing someone" is hyperbole and unsupported by *any* evidence whatsoever.

[13] *Strickland*, 466 U.S. at 698.

[14] *Avery*, 548 F.3d at 439.

But this case is not an isolated instance of the Sixth Circuit deciding an important question of federal law in a way that conflicts with decisions of this Court.[15] Indeed, this case is not even the only instance where the Sixth Circuit has imposed a *Cronic* standard on habeas review without citing to *United States v. Cronic.*[16]

This Court recently granted certiorari to the Sixth Circuit in *Smith v. Spisak*, and identified one of the issues for briefing as whether "the Sixth Circuit exceeded its authority under AEDPA when it applied *United States v. Cronic* [], to presume that a habeas petitioner suffered prejudice from several allegedly deficient statements"). In *Smith*, the Sixth Circuit undertook its analysis by noting that trial counsel was ineffective based on his arguments at closing. But the Sixth Circuit determined that the comments were the functional equivalent of counsel not being present at all and, on the basis, found that the defendant was *per se* prejudiced by those arguments. Just as in the instant case, the Sixth Circuit cited *Strickland* and purported to apply that case. Moreover, like the instant case, the Sixth Circuit did not even cite *Cronic* in its analysis. But the Sixth Circuit's decision not to cite *Cronic* is not dispositive – in both cases the Sixth Circuit held that trial counsel's failures were *per se* prejudicial and granted habeas relief on that basis.

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[15] The State of Michigan notes that it has filed three other petitions for certiorari contemporaneously with this petition. See *Berghuis v. Thompkins*, (08-1470); *Metrish v. Newman*, (08-1401); and *Berghuis v. Smith*, (08-1402). All four are murder cases, all published, all reaching disposition in February 2009, in which the State of Michigan contends the Sixth Circuit failed to accord the State court decisions with the proper level of deference required by AEDPA.

[16] *United States v Cronic*, 466 U.S. 648, 659 (1984).

Here, the Sixth Circuit did not demonstrate that, but for trial counsel's deficient performance, there was a "reasonable probability" that the outcome of the trial would have been different. Rather, the Sixth Circuit merely opined that the alibi witnesses "could have" supplied reasonable doubt and the failure to call them deprived Respondent of a "reasonable shot at acquittal." In other words, the Sixth Circuit articulated a *Cronic* standard for the failure to call an alibi witness; even though the Sixth Circuit did not cite *Cronic*.

Respectfully submitted

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In the

Supreme Court of the United States

JOHN PRELESNIK,
Petitioner,

v.

CHAMAR AVERY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR REHEARING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
PETITION FOR REHEARING 1

TABLE OF AUTHORITIES

Page

Cases

Florida v. Rodriguez,
461 U.S. 940 (1983) 1

Smith v. Spisak,
No. 08-724 ..... 1, 2, 3

Spisak v. Mitchell,
465 F.3d 684, 706 (6th Cir. 2006) 2

Strickland v. Washington 1

United States v. Cronic 1, 2

Rules

Sup. Ct. R. 44.2 1

PETITION FOR REHEARING

Petitioner respectfully petitions for rehearing of this Court's October 5, 2009 order. Specifically, Petitioner respectfully requests that this Honorable court (1) grant rehearing; and (2) hold this case in abeyance for this Court's decision in *Smith v. Spisak*, a case in which this Court has granted certiorari to the Sixth Circuit to address that court's failure to accord State court decisions with the proper level of deference required by Antiterrorism and Effective Death Penalty Act (AEDPA).

Although this Court has established stringent standards for rehearing, this case falls within one of the exceptions contemplated by Sup. Ct. R. 44.2. The relevant exception exists where this Court has granted review of a related issue in another case.[1] On October 13, 2009, following the denial of certiorari in this case, this Court heard oral argument in *Smith v. Spisak*, No. 08-724. One of the issues before the Court in *Spisak* is whether "the Sixth Circuit exceeded its authority under AEDPA when it applied *United States v. Cronic* [], to presume that a habeas petitioner suffered prejudice from several allegedly deficient statements." Substantially the same question was raised in the instant case, in that the issue raised in this petition is whether the Sixth Circuit "abrogated the 'prejudice' prong of *Strickland v. Washington*."

This case, just like *Spisak*, involves a question of whether the Sixth Circuit exceeded its authority under AEDPA by imposing a *Cronic* standard to a claim of ineffective assistance of counsel on habeas review. In *Spisak*, the Sixth Circuit concluded that trial counsel's closing argument – where he recited several aggravating

[1] See, e.g., *Florida v. Rodriguez*, 461 U.S. 940 (1983).

factors against his client based on his clients own testimony at trial – was ineffective. However, instead of analyzing the error under the second prong of *Strickland*, the Sixth Circuit concluded without analysis that "[a]bsent trial counsel's behavior during the closing argument of the mitigating phase of the trial, we find that a reasonable probability exists that at least one juror would have reached a different conclusion about the appropriateness of death . . . ."[2]

The Sixth Circuit's surreptitious application of *Cronic* – without citing that case – was repeated in the instant case. Here, the Sixth Circuit concluded that Respondent's counsel was ineffective for failing to interview two alibi witnesses that the State trial court found to be wholly unbelievable. But rather than analyze this error under the second prong of *Strickland*, the Sixth Circuit instead opined that the failure to call the witnesses deprived Respondent of "a reasonable shot of acquittal" and, therefore, he was prejudiced by the loss of that "shot." In other words, the same question before this Court in *Spisak* controls the outcome in this case. That is, did the Sixth Circuit apply a *Cronic* standard to the Respondent's ineffective assistance of counsel claim? And, is the application of a *Cronic* standard consistent with the requirements of the AEDPA?

Given that this related question is already before the Court, it would be appropriate to hold the petition for certiorari in the instant case in abeyance pending this Court's decision in *Spisak*. Indeed, it would be quite helpful to this Court's consideration of the issue in *Spisak* to consider the instant case at the same time it considers the *Spisak* case, thereby fully exploring the

[2] *Spisak v. Mitchell*, 465 F.3d 684, 706 (6th Cir. 2006).

scope of the second-prong of *Strickland* in the context of the AEDPA standard.

For these reasons, the motion for rehearing should be granted, and this case should be held in abeyance pending the decision in *Spisak*.

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Dated: October 2009

CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2. Specifically, Respondent was released from custody in 2008.

B. Eric Restuccia
Michigan Solicitor General